(1)

Supreme Court, U.S.
FILED

No. 94 1185 DEC 7 1994

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

CITIES OF CHANUTE, AUBURN, GARNETT, HUMBOLDT, IOLA, NEODESHA, OSAGE CITY, KANSAS AND CLEVELAND, OKLAHOMA
Petitioner,

v.

WILLIAMS NATURAL GAS COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

ROBERT PENNINGTON
HENSHALL PENNINGTON & BRAKE
101 West Main Street
P. O. Box 667
Chanute, KS 66720
(316) 431-2600

LARRY D. HENDRICKS
STUMBO, STUMBO, HANSON & HENDRICKS
2887 S.W. MacVicar Ave.
Topeka, KS 66611
(913) 267-3410

CHARLES F. WHEATLEY, JR. *
DON CHARLES UTHUS
TIMOTHY P. INGRAM
WHEATLEY & RANQUIST
34 Defense Street
Annapolis, MD 21401
(410) 266-7524
(301) 261-8608

Counsel for Petitioners

**Counsel of Record*

December 7, 1994

QUESTION PRESENTED

Whether Plaintiff Cities who substantially prevailed in their request for injunctive relief under the Federal antitrust laws against an interstate pipeline company for refusal to provide transportation services to allow Cities to purchase natural gas from independent producers in competition with the pipeline can be denied reasonable attorney's fees under Section 16 of the Clayton Act, 15 U.S.C. § 26, on the ground that the Cities were unsuccessful in a subsequent damages phase of the case.

TABLE OF CONTENTS

Page No.

QUESTION PRESENTED . . . . . (i)

TABLE OF CONTENTS . . . . . (ii)

TABLE OF AUTHORITIES . . . . . (iii)

OPINIONS BELOW . . . . . (2)

JURISDICTION . . . . . (2)

STATUTE INVOLVED . . . . . (2)

STATEMENT OF THE CASE . . . . . (3)

REASONS FOR GRANTING THE WRIT . . . . . (7)

The Court's Decision Conflicts With The Plain Language Of § 16 Of The Clayton Act And Prior Decisions Of Other Circuits . . . . . (7)

CONCLUSION . . . . . (10)

TABLE OF AUTHORITIES

Page No.

JUDICIAL DECISIONS:

City of Chanute, et al. v. Williams Natural Gas Co., 678 F. Supp. 1517 (D. Kan. 1988) 3, 4

City of Malden v. Union Electric Co., 887 F.2d 157 (8th Cir. 1989) 8, 9

Dahlem v. Board of Education of Denver Public Schools, 901 F.2d 1508 (10th Cir. 1990) 0

Farrar v. Hobby, 506 U.S. ___, 113 S.Ct. 566 (1992) 8, 9

Hewitt v. Helms, 482 U.S. 755 (1987) 8

Southwest Marine, Inc. v. Campbell Industries, 796 F.2d 291 (9th Cir. 1986) 8, 9

ADMINISTRATIVE:

Williams Natural Gas Co., 48 FERC ¶ 61,057 (1989) 6

Williams Natural Gas Co., 43 FERC ¶ 61,227 (1988) 4

STATUTES:

Clayton Act, Section 16, 15 U.S.C. § 26 . . . . . *passim*

Sherman Act, Section 2, 15 U.S.C. § 2 2

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

CITIES OF CHANUTE, AUBURN, GARNETT, HUMBOLDT, IOLA, NEODESHA, OSAGE CITY, KANSAS AND CLEVELAND, OKLAHOMA
Petitioner,

v.

WILLIAMS NATURAL GAS COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioners, the Cities of Chanute, Auburn, Garnett, Humboldt, Iola, Neodesha, Osage City, Kansas and the City of Cleveland, Oklahoma respectfully pray that a writ of *certiorari* issue to review the judgment and Opinion of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled proceeding on August 8, 1994, and a denial of Plaintiffs' petition for rehearing *en banc*, entered September 8, 1994.

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit is reported at 31 F.3d 1041 (10th Cir. 1994), and is printed in the appendix hereto, page 1a, *infra*.

JURISDICTION

The Kansas and Oklahoma Cities, Petitioners herein brought this suit under § 2 of the Sherman Act, 15 U.S.C. § 2 and § 16 of the Clayton Act, 16 U.S.C. § 26, in the District Court of Kansas, Wichita requesting injunctive relief and damages. The district court granted a preliminary injunction in Cities' favor on February 5, 1988, reported at 678 F.Supp. 1517 (D. Kan. 1988). On appeal by the Respondent, Williams Natural Gas Company, the Court of Appeals for the Tenth Circuit entered an order on July 26, 1988 approving a Stipulation between the parties which accorded to the Cities permanent rights to 100% transportation on the Respondent's interstate gas pipeline. App. 20a. This ended the injunctive relief phase of Cities' case under § 16 of the Clayton Act. Subsequent proceedings seeking damages were denied on summary judgment by the district court and affirmed by the Court of Appeals for the Tenth Circuit, 955 F.2d 641, 646 (10th Cir.) *cert. denied*, 113 S.Ct. 96 (1992). The Cities' request for attorneys' fees relating to their request for injunctive relief under § 16 of the Clayton Act, 15 U.S.C. § 26 was denied by the district court, reported at 820 F.Supp. 1290 (D. Kan. 1993) and affirmed by the Tenth Circuit in the opinion below, 31 F.3d 1041 (10th Cir. 1994), App 1a.

The jurisdiction of this Court to review the judgment of the Tenth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 16 of the Clayton Act, 15 U.S.C. § 26, provides:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in

> any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, . . . and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable or loss or damage is immediate, a preliminary injunction may issue . . . . In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

STATEMENT OF THE CASE

In this case, the plaintiff Cities initially filed a complaint and sought a preliminary injunction in the District Court of Kansas, pursuant to Section 16 of the Clayton Act, 15 U.S.C. §26, against Williams Natural Gas Company ("WNG") for cutting off the transportation of gas supplies the Cities had contracted for directly from independent producers on August 1, 1988. Section 16 of the Clayton Act authorizes the issuance of a preliminary injunction for any violation of the antitrust laws and expressly authorizes the award of a "reasonable attorney's fee" for a plaintiff that "substantially prevails" in any action therein.

After 10 days of trial hearings, briefs and oral argument, the district court issued a preliminary injunction requiring WNG to provide immediate 100 percent transportation to all Cities under either firm or interruptible transportation. *City of Chanute, et al. v. Williams Natural Gas Co.*, 678 F.Supp. 1517, 1519 (D. Kan. 1988). The court ruled

> Plaintiffs have thus established the likelihood they will prevail on their "essential facility" claim and have raised questions going to the merits "so serious, substantial, difficult and doubtful as to make them a fair ground for litigation." With this determination made,

> plaintiffs have satisfied ~~each~~ of the requirements necessary to obtain a preliminary injunction.

678 F.Supp. at 1534.

The district court, on February 5, 1988, ordered WNG "to open access to its pipeline to the eight plaintiff Cities for the transport of third party gas," ruling that once the Cities' contracts for such gas were finalized, "the Cities will have waived their present contracts with Williams and any rights or claims that may exist under those contracts." 678 F.Supp. at 1534.

WNG filed a notice of appeal of the district court's preliminary injunction to the Court of Appeals for the Tenth Circuit on February 25, 1988, and filed a motion for a stay pending appeal on the merits. WNG claimed a stay was required because it would suffer over $100 million loss if the Cities proceeded. 1 This Court granted a stay, scheduled briefs to be filed on the merits of the case, and set an expedited date for oral argument.

Earlier, on January 4, 1988, WNG had filed a "Revised Stipulation and Agreement" (RS&A) at the Federal Energy Regulatory Commission ("FERC") as its proposal for transport of third party gas under FERC's regulatory Order Nos. 436 and 500. *Williams Nat. Gas Co.*, 43 F.E.R.C. ¶ 61,227 (1988). The RS&A was not agreed to by the eight Cities because it did not provide the Cities with immediate 100% transportation, did not waive the Cities existing contracts, and had provided other restrictions contrary to the preliminary injunction awarded the court, Id., 43 F.E.R.C. at 61,589 (1988).

WNG filed a "Suggestion of Mootness" on July 20, 1988 with the Tenth Circuit, contending that FERC's approval of the RS&A made the district court's preliminary injunction moot.

At the oral argument before the Tenth Circuit on July 22, 1988, the court told the parties they could either agree as to transportation

---

1 Later WNG dropped this claim.

arrangements and submit a stipulation to the court for approval or the issue of mootness would be remanded to the district court. Thereupon the parties at the courthouse negotiated an agreement set forth in the Stipulation dated that day, July 22, 1988. This Stipulation was approved by the court on July 26, 1988. App. at 20a.

The terms of the Stipulation of July 22, 1988 defined rights to the Cities which were substantially greater than those contained in the RS&A. The first clause provided as to all eight Cities, whether their sales contracts with WNG were expired or not, that WNG "will provide ... firm and/or interruptible transportation service for 100 percent of their natural gas requirements, in lieu of full requirements or other sales service." App. at 22a ¶ 1. The Cities' undisputed evidence to the district court (at the hearing relating to Cities' claims for attorney's fees) established that the Cities negotiated and entered into the Stipulation of July 22, 1988 only because it provided 100 percent immediate firm or interruptible transportation, greater rights than available to them under the terms of WNG's RS&A at the FERC. [2]

This 100 percent transportation provision in the Stipulation of July 22, 1988 resulted in a saving of over $3.7 million to Cities beyond the most liberal conversion option of the RS&A over the four years of 1988-1992. [3]

The formal order by the Tenth Circuit on July 26, 1988 approving the Stipulation of July 22, 1988 between the parties ended the injunction phase of the Cities' suit under Section 16 of the Clayton Act. Since the Stipulation expressly gave to the Cities new rights on a

---

2 Testimony of Robert Walker (City Manager, Chanute, Kan.) at February 8, 1993 hearing. Appellate (Aplt) App. at 130; Affidavit of Rachel Mueller (City Clerk, Humboldt, Kan.), Aplt. App. at 377, 1381-82; Affidavit of Robert Walker, Aplt. App. at 400, 403-04.

3 Testimony of Robert Walker (City Manager, Chanute) at February 8, 1993 hearing, Aplt. App. at 120-21; Affidavit of Edgar Bernstein, Aplt. App. at 412.

permanent basis similar to those contained in the district court's earlier preliminary injunction, and greater than the RS&A, the Cities agreed in the Stipulation that the proceeding then before the Court of Appeals should be dismissed.

The Federal Energy Regulatory Commission subsequently ruled that the Stipulation of July 22, 1988 between WNG and the Cities was a settlement that exempted Cities from take-or-pay charges:

> The Cities have advised WNG that they wish to terminate their sales service agreements and convert to 100% firm or interruptible transportation service. The conversions are not effected under section 284.10 of the regulations. In settlement of an antitrust case brought by some of the Cities (the "Kansas Cities"), WNG and the Kansas Cities entered a stipulation on July 22, 1988, in which they agreed: (1) that unexpired sales contracts are mutually terminated, (2) that WNG would provide firm and/or interruptible transportation service, and (3) that the Kansas Cities would not oppose abandonment of the sales service.
>
> * * * *
>
> We cannot condition the instant authorization on the Cities' having continued obligations for take-or-pay costs. The Cities are not subject to the Commission's jurisdiction and do not require our authority to cease purchases once their contractual obligations have ended. We would be unable to enforce any condition imposed on abandonment after the expiration of the Cities' contractual obligations.

Williams Nat. Gas. Co., 48 F.E.R.C. ¶ 61,057 at pp. 61,293-3, 61,296 (1989), (emphasis added).

Subsequent to the Stipulation of July 22, 1988 approved by the Tenth Circuit by order issued on July 26, 1988 (App. 20a), the Cities sought damages under § 4 of the Clayton Act relating to the narrow

period prior to the Stipulation. This claim of damages was denied on summary judgment by the district court and affirmed by the Tenth Circuit. *City of Chanute, et al. v. Williams Natural Gas Co.*, 955 F.2d 641 (10th Cir.), *cert. denied*, 113 S.Ct. 96 (1992). Thereafter Cities sought attorney's fees related solely to their successful resolution of their request for injunctive relief under § 16 of the Clayton Act.

A panel of three judges of the Court of Appeals for the Tenth Circuit below in a decision entered on August 8, 1994, denied the Cities' request for an award of attorney's fees relating to their request for injunctive relief under § 16 of the Clayton Act. App. 1a. The court based its ruling on the novel proposition that no award of attorneys' fees can be made for success in obtaining antitrust injunctive relief under § 16 of the Clayton Act, where a subsequent request for damages under § 4 of the Clayton Act has been denied.

REASONS FOR GRANTING THE WRIT

The Court's Decision Conflicts With The Plain Language Of § 16 Of The Clayton Act And Prior Decisions Of Other Circuits

Once the Cities had obtained permanent relief for the future through the Stipulation of July 22, 1988, approved by order of the Tenth Circuit on July 26, 1988, App. 20a, ending the injunctive relief part of the case, the remaining issues relating to damages under §4 of the Clayton Act were confined to the narrow interim period where WNG had denied transportation. The court below relies on its subsequent decision in the damage phase, in which the Cities were not successful, as a basis for denying an award of attorney's fees for the earlier injunctive relief obtained by the Cities in the Stipulation. In so ruling, the court has made new law that conflicts with the plain language of § 16 of the Clayton Act and prior decisions of the Courts of appeal for the eighth and ninth Circuits.

The language of Section 16 of Clayton Act is clear:

> . . . [A] preliminary injunction [for a violation of the antitrust laws] may issue....In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

15 U.S.C.A. §26 (emphasis added). The statute in mandatory language provides that the court "shall award" a reasonable attorney's fee to a plaintiff that substantially prevails in an action for a preliminary injunction. It does not require as a condition precedent that a plaintiff also prevail in an action for damages. As such, the outcome of a damage suit is irrelevant.

City of Malden v. Union Electric Co., 887 F.2d 157, 165 (8th Cir. 1989), and *Southwest Marine, Inc. v. Campbell Industries*, 796 F.2d 291 (9th Cir. 1986), hold that a judgment under Section 4 of the Clayton Act for damages is not a prerequisite to an award of attorney's fees under Section 16. These decisions from the Eighth and Ninth Circuits conflict with the decision of of the Tenth Circuit below.

In *Farrar v. Hobby*, 506 U.S. ___, 113 S.Ct. 566 (1992), this Court held that any victory, anything that "materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff" makes the Plaintiff a prevailing party. In *Farrar*, the plaintiff received a civil rights judgment for $1.00. Despite the fact that this was only a nominal award, the Court held the plaintiff was a prevailing party. "Plaintiff must prove the settling of some dispute 'which affects the behavior of the defendant towards the plaintiff.'" 121 L.Ed.2d at 503, *quoting Hewitt v. Helms*, 482 U.S. 755, 761 (1987). Under the standard set forth in the *Farrar* case, the Cities met the "prevailing party" standard of §1988 of the Civil Rights Act which, *a fortiori* , would meet the mandatory standard of §16 of the Clayton Act.

The issuance of a preliminary injunction by the district court to the Cities requiring the WNG pipeline company to provide 100% transportation to the Cities for competitive supplies of natural gas

purchased from independent producers was confirmed in the Stipulation of July 22, 1988, and approved by order of the Tenth Circuit. App. 20a and 22a ¶ 1. This provided the Cities with the right to permanent 100% transportation on WNG's system -- a right that went substantially beyond the limited transportation available to the Cities under WNG's filings at the FERC. This provided benefits to the Cities of over $3.7 million. The Tenth Circuit below did not deny these clear facts but ruled that the Cities would not be a prevailing party for the injunction proceedings since they were unsuccessful in the later proceedings for damages. This was clearly inconsistent with this Court's decision in *Farrar v. Hobby, supra.*

The same result follows under *Dahlem v. Board of Education of Denver Public Schools*, 901 F.2d 1508 (10th Cir. 1990). In *Dahlem*, the plaintiff sued under the Civil Rights Act, seeking the right to participate on the women's gymnastic team in high school, which had no men's program. The district court awarded a preliminary injunction to Dahlem. The defendant appealed. The case became moot before defendant's appeal could be heard, because Dahlem had graduated. Despite this, the Tenth Circuit held that he was a "prevailing party," and therefore entitled to attorneys' fees, ruling that the prior award of a preliminary injunction constituted relief on the merits. This determination was made without regard to whether the district court's decision on the underlying merits in the preliminary injunction was correct:

> We make this inquiry "without regard to whether we think the district court's decision on the underlying merits was correct." (citing cases).

See 901 F.2d at 1512. In fact, the Tenth Circuit held that plaintiff was a prevailing party, knowing that it had reversed a companion case to *Dahlem*'s on the merits.

The decision of the court below not only conflicts with decisions of the Eighth and Ninth circuits in *City of Malden* and *Southwest Marine, supra*, but improperly seeks to indirectly overrule its own prior precedent in *Dahlem* by relying on a subsequent decision under the limited, different issues in the § 4 damage phase as controlling of the injunctive relief case before the court. Thus, the court below has established a new

principle of law that is inconsistent with the clear mandate of § 16 of the Clayton Act and conflicts with decisions by the Eighth and Ninth Circuits, as well as prior precedents of the Tenth Circuit itself.

CONCLUSION

For the above reasons, the Kanas and Oklahoma Cities, petitioners herein, request that this Court issue a writ of *certiorari* to review the decision of the Court of Appeals for the Tenth Circuit below.

Respectfully submitted,

Charles F. Wheatley, Jr.
Don Charles Uthus
Timothy P. Ingram
WHEATLEY & RANQUIST
34 Defense Street
Annapolis, MD 21401
(410) 266-7524

Larry D. Hendricks
Ronald Greg Wright
STUMBO, STUMBO, HANSON
& HENDRICKS
2887 S.W. MacVicar Avenue
Topeka, KS 66611
(913) 267-3410

Robert Pennington
HENSHALL, PENNINGTON & BRAKE
101 West Main Street
New Bank of Commerce Bldg.
P.O. Box 667
Chanute, KS 66720
(316) 431-2600

December 7, 1994

INDEX TO APPENDIX

Page No.

City of Chanute, Kansas, et al. v.
Williams Natural Gas Co.
31 F.3d 1041 (10th Cir. 1994) 1a

City of Chanute, Kansas, et al. v.
Williams Natural Gas Co.
Order Denying Rehearing (10th Cir.
Sept. 8, 1994) 18a

City of Chanute, Kansas, et al. v.
Williams Natural Gas Co.
Order Approving Stipulation,
No. 88-1225 (10th Cir. July 26, 1988) 20a

City of Chanute, Kansas, et al. v.
Williams Natural Gas Co.
Stipulation, July 22, 1988 ..... 22a

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CITY OF CHANUTE, KANSAS; CITY OF AUBURN, KANSAS; CITY OF CLEVELAND, OKLAHOMA; CITY OF GARNETT, KANSAS; CITY OF HUMBOLDT, KANSAS; CITY OF IOLA, KANSAS; CITY OF NEODESHA, KANSAS; CITY OF OSAGE, KANSAS,	)	
Plaintiffs-Appellants,	)	No. 93-3101 93-3125
v.	)	
WILLIAMS NATURAL GAS COMPANY,	)	
Defendant-Appellee.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
(D.C. No. 87-1463-PFK)

Charles F. Wheatley, Jr. (Don Charles Uthus, Peter A. Goldsmith, and Timothy P. Ingram, of Wheatley & Ranquist, Annapolis, Maryland; Larry D. Hendricks and Ronald Greg Wright, of Stumbo, Stumbo, Hanson & Hendricks, Topeka, Kansas; and Robert Pennington, of Henshall, Pennington & Brake, Chanute, Kansas, with him on the briefs), of Wheatley & Ranquist, Annapolis, Maryland, for the Plaintiffs-Appellants.

John T. Schmidt (C. Kevin Morrison, of Conner & Winters, Tulsa, Oklahoma; David Batow, General Counsel, of Williams Natural Gas Company, Tulsa, Oklahoma; William J. Sears, Senior Counsel, of the Williams Companies, Inc., Tulsa, Oklahoma; and Donald W. Bostwick

and Teresa J. James, of Adams, Jones, Robinson & Malone, Wichita, Kansas, with him on the briefs), of Conner & Winters, Tulsa, Oklahoma, for the Defendant-Appellee.

Before ANDERSON and TACHA, Circuit Judges, and ROSZKOWSKI,* District Judge

---

* The Honorable Stanley J. Roszkowski, Senior District Judge, United States District Court for the Northern District of Illinois, sitting by designation.

TACHA, Circuit Judge.

Plaintiffs appeal from the district court's denial of their motion for attorneys' fees and costs pursuant to § 16 of the Clayton Act, 15 U.S.C. § 26. See City of Chanute v. Williams Natural Gas Co., 820 F. Supp. 1290 (D. Kan. 1993). We exercise jurisdiction under 28 U.S.C. § 1291 and affirm.

I. Background

This appeal is the latest round in a long string of litigation between plaintiff cities ("the cities") and defendant, Williams Natural Gas Co. ("Williams"). The specific issue we must decide is whether the cities are entitled to attorneys' fees under § 16 of the Clayton Act. Because the results of previous trips by these parties up the litigation ladder are relevant to the attorneys' fee issue, we recount prior litigation as necessary background. 1

The cities purchase natural gas and resell it to customers located in the cities and surrounding areas. Williams owns and operates the only interstate pipeline serving the cities. Originally, each of the cities had a "full requirements" contract with Williams. Such

---

1 A more detailed factual history of this case, as well as a history of the natural gas industry, is set out in several district court opinions. See City of Chanute v. Williams Natural Gas Co., 678 F. Supp. 1517 (D. Kan. 1988) (Chanute I); City of Chanute v. Williams Natural Gas Co., 1990-1 Trade Cas. ¶ 68,967, 1990 WL 20019 (D. Kan. Feb. 16, 1990) (Chanute II); City of Chanute v. Williams Natural Gas Co., 743 F. Supp. 1437 (D. Kan. 1990) (Chanute III). In addition, this court has previously recounted some of the background of this case in City of Chanute v. Williams Natural Gas Co., 955 F.2d 641, 646 (10th Cir.) (Chanute IV), cert. denied, 113 S. Ct. 96 (1992), but we repeat that background here for convenience. We will refer to these cases by number in the remainder of this opinion. For those of you keeping score at home that would make the district court opinion in this appeal, City of Chanute v. Williams Natural Gas Co., 820 F. Supp. 1290 (D. Kan. 1993), "Chanute V" and this opinion "Chanute VI."

contracts require the cities to purchase all their natural gas from Williams and in return Williams agrees to supply all of the cities' natural gas needs. As a result, all of the natural gas used by the cities was bought from Williams.

In December 1986, however, the landscape began to change. Williams sought Federal Energy Regulatory Commission ("FERC") approval to allow it to transport gas from third-party suppliers - - thereby acting as a common carrier - - on a permanent basis. 2 While awaiting FERC approval, Williams initiated a temporary open access program to transport third-party gas for the cities pursuant to § 311 of the Natural Gas Policy Act, 15 U.S.C. §3371 (1978). The cities began to negotiate and enter into agreements for gas from third-party suppliers who offered gas at lower prices than Williams.

The temporary open access program ran from December 1986 to August 1, 1987. During this period, Williams experienced difficulty paying its third-party suppliers. 3 On August 1, 1987, Williams ended its temporary open access program and largely closed its pipeline to third-party gas. 4 Two days after Williams closed its pipeline, the cities filed suit alleging violations of §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, and requesting injunctive relief

---

2 Williams sought a transportation tariff pursuant to FERC Order No. 436, 50 Fed. Reg. 42,408 (1985).

3 This difficulty was due to the "take-or-pay" provisions in Williams' contracts with the suppliers. Such provisions obligate a pipeline to pay for certain volumes of gas even if the pipeline is unable to sell that amount to its customers.

4 Some third-party gas remained available under FERC regulation. Williams was still required to transport third-party gas under FERC Order No. 451 which "established procedures for the renegotiation of . . . pre-NGPA gas prices and the release of gas covered by . . . pre-NGPA gas purchase contracts." Chanute I, 678 F. Supp. at 1524-25.

under §16 of the Clayton Act, 15 U.S.C. § 26. On February 5, 1988, the Federal District Court for the District of Kansas granted the cities a preliminary injunction. See Chanute I.

Williams subsequently filed a notice of appeal to this court, and on March 3, 1988, we granted a stay of the preliminary injunction pending full resolution of the appeal. Prior to oral argument on the preliminary injunction, FERC approved Williams' revised stipulation and agreement, or "RS&A," establishing Williams' permanent open access program beginning July 20, 1988. After approval of the RS&A, Williams filed a suggestion of mootness with this court. At oral argument on July 22, 1988, we asked the parties to attempt to reach agreement in light of the RS&A and informed them that, if they could not reach agreement, we would remand the case to the district court for consideration of the mootness issue. The same day, the parties reached agreement and filed a stipulation that provided for a withdrawal of the appeal and a dismissal of the preliminary injunction. We approved the stipulation on July 26, 1988, vacated the preliminary injunction along with our stay order, and dismissed the appeal. There is some disagreement between the parties regarding whether the stipulation provided rights to the cities greater than those they were due as a result of the RS&A and the general open access program. We find it unnecessary to resolve this question for purposes of this appeal.

Because there remained a damages claim by the cities against Williams under § 4 of the Clayton Act, 15 U.S.C. § 15, arising from the period of Williams' reversal of its interim open access program, the case returned to the district court for an adjudication of the merits of the cities' antitrust allegations. The district court granted summary judgment for Williams on all of the cities' claims. See Chanute II; Chanute III. We affirmed the district court's judgment for Williams. See Chanute IV.

Despite the rejection of their antitrust claims on the merits, the cities brought the motion for attorneys' fees under § 16 of the Clayton Act which is now before us. The cities argue both that they are formally "prevailing parties" in light of their success in getting a preliminary injunction against Williams and that at any rate they have

"substantially prevailed" in light of the terms of the stipulation agreement. Rejecting these arguments, on February 18, 1993, the district court denied the cities' motion for attorneys' fees.

On March 19, 1993, the cities filed a notice of appeal with this court that identified the appealing parties as "City of Chanute, Kansas, et al." (appeal No. 93-3101). Recognizing that a notice of appeal so captioned is potentially ineffective as to the seven of the eight plaintiff cities not specifically named, on April 8, 1993, we directed the parties to brief the issue of our jurisdiction to hear the appeals of the seven unnamed cities. Apparently recognizing the potential jurisdiction problem, the cities filed with the district court a motion under Fed. R. App. P. 4(a) (5) for an extension of time to file an amended notice of appeal. On April 15, 1993, the district court granted the cities' motion, giving them ten days to file an amended notice of appeal. The cities filed an amended notice of appeal on April 21, 1993 specifically naming all eight cities involved in the Williams litigation (appeal No. 93-3125). 5 The cities also filed a motion with this court, opposed by Williams, to vacate our order that the parties brief the jurisdictional issue in light of the amended notice of appeal. It is in this posture that the case is now before us.

---

5 We have consolidated the appeals numbered 93-3101 (first notice of appeal) and 93-3125 (second notice of appeal) and dispose of both through this opinion.

II. Sufficiency of Plaintiffs' Notice of Appeal 6

As a preliminary matter, Williams continues to maintain that the appeals of the seven cities not specifically named in the original notice of appeal must be dismissed for lack of jurisdiction. Fed. R. App. P. 3(c) directs that a "notice of appeal shall specify the party or parties taking the appeal." 7 In Torres v. Oakland Scavenger Co., 487 U.S. 312 (1988), the Supreme Court made clear that compliance with this rule is indispensable to appellate jurisdiction. Id. at 315-316. The Court also specifically held in Torres that use of the phrase "et al." in a notice of appeal is not sufficient to satisfy Rule 3(c) as to those parties not otherwise specifically named in the notice. Id. at 317-318; see also Dalton Dev. Project v. Unsecured Creditors Comm., 948 F.2d 678, 681-82 (10th Cir. 1991); Laidley v. McClain, 914 F.2d 1386, 1389 (10th Cir. 1990) (holding that "the failure to specifically designate a party somewhere in the notice of appeal is a jurisdictional bar to that party's appeal") (emphasis added). This is exactly the situation with the cities' first notice of appeal. Filing the notice on behalf of "City of Chanute, Kansas, et al." without more is sufficient notice of appeal only as to the City of Chanute, Kansas.

Only if the Cities' second, amended notice of appeal is valid do we have jurisdiction over the appeals of the seven cities not named in the original notice. Fed. R. App. P. 4(a)(1) directs that to be effective, a notice of appeal must be filed within thirty days of the entry of the judgment or order from which the party appeals (the "prescribed period"). It is undisputed that the cities' amended notice of appeal was not filed within the prescribed period (the judgment appealed from was entered on February 18, 1993, and the amended notice of appeal was not filed until April 21, 1993). Therefore the

---

6 We do not find it necessary to rule on the cities' motion to vacate our order to brief the jurisdictional issue. We have determined simply to decide the issue which in any case was briefed by both parties.

7 We quote here from the version of Fed. R. App. P. 3(c) in effect at the time the cities filed their notice of appeal.

validity of the amended notice of appeal depends upon the validity of the district court's grant of the cities' Rule 4(a)(5) motion to extend that time to file notice. [8] Rule 4(a)(5) provides:

> The district court, upon a showing of excusable neglect . . ., may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the [original prescribed period]. . . . No such extension shall exceed 30 days past [the prescribed period] or 10 days from the date of the entry of the order granting the [Rule 4(a)(5)] motion, whichever is later.

The district court found "excusable neglect" on the part of the cities. We review the district court's determination of "excusable neglect" with respect to a Rule 4(a)(5) motion only for an abuse of discretion. Gooch v. Skelly Oil Co., 493 F.2d 366, 368 (10th Cir.), cert. denied, 419 U.S. 997 (1974).

William argues that at best the record in this case supports only simple mistakes or failure to discover the well established Supreme Court precedent in Torres as reason for the cities' failure in the first instance to file effective notice of appeal. Williams contends that neither of these reasons is sufficient grounds for a finding of excusable neglect under Rule 4(a)(5) and that the district court

---

8 It is appropriate here to note the cities' argument that we should not address Williams jurisdictional challenge to the appeal because Williams did not cross-appeal the district court's grant of the cities' Rule 4(a)(5) motion. We consider the question of jurisdiction nonetheless because the circumstances of this case fairly raise jurisdictional concerns, and, as always, "we have a duty to inquire into our own jurisdiction." McGeorge v. Continental Airlines, Inc., 871 F.2d 952, 953 (10th Cir. 1989); see also Gooch v. Skelly Oil Co., 493 F.2d 366 (10th Cir.) (considering propriety of district court's grant of Rule 4(a)(5) motion absent cross-appeal on the issue), cert. denied, 419 U.S. 997 (1974).

therefore abused its discretion in granting the Rule 4(a)(5) motion. We disagree.

In Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd Partnership, 113 S. Ct. 1489 (1993), the Supreme Court interpreted the meaning of "excusable neglect" in the context of the provision for late filings in bankruptcy law. The Court pointed out that "absent sufficient indication to the contrary, . . . Congress intend the words in its enactments to carry their ordinary, contemporary common meaning." Id. at 1495 (internal quotations omitted). It pointed out further that the common meaning of "neglect" is "'to give little attention or respect' to a matter, or . . .' to leave undone or unattended to especially] through carelessness.'" Id. at 1494-95 (emphasis omitted) (quoting Webster's Ninth New Collegiate Dictionary 791 (1983)). The Court concluded that in using the term "excusable neglect" in the bankruptcy code, "Congress plainly contemplated that the courts would be permitted, where appropriate, to accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control." Id. at 1495. The Court directed further that in determining where neglect is "excusable" we must "take] account of all relevant circumstances surrounding the party's omission." Id. at 1498. The Court specifically pointed to four factors relevant to this calculation: "the danger of prejudice to [the nonmoving party], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." Id; see also In re Centric Corp., 901 F.2d 1514, 1517 (10th Cir.), cert. denied, 498 U.S. 852 (1990).

Because the Court's analysis of what constitutes "excusable neglect" in the bankruptcy context rested on the plain meaning of the terms, there is no reason that the meaning would be different in the context of Fed. R. App. P. 4(a)(5). See United States v. Hopper, 9 F.3d 257, 258-59 (2d Cir. 1993) (applying the Pioneer analysis of "excusable neglect" in the context of Fed. R. App. P 4(a)(5); see also Pioneer, 113 S. Ct. at 1496 (noting that "excusable neglect" in the context of the Fed. R. Civ. P. 6(b) carries the same commonly accepted meaning as discussed in the bankruptcy rules context such that it "may extend to inadvertent delays"); Romero v. Peterson, 930

F.2d 1502, 1505 (10th Cir. 1991) (holding that the presence of "excusable neglect" under Rule 4(a)(5) "should be determined on the basis of the common sense meaning of the two simple words") (internal quotations omitted). Thus we apply the Pioneer test for "excusable neglect" under Fed. R. App. P. 4(a)(5). 9 This is not to say that the test for excusable neglect is not a strict one. It is merely to say that, "[a]lthough inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect, it is clear that 'excusable neglect' . . . is a somewhat 'elastic concept' and is not limited strictly to omissions caused by circumstances beyond the control of the movant." Pioneer, 113 S. Ct. at 1496 (footnotes omitted).

Focusing on the four factors outlined in Pioneer, we cannot say that the district court abused its discretion in finding excusable neglect. Williams focuses on factor three of the Pioneer analysis, pointing out that avoidance of the delay in filing the notice of appeal seems to have been within the reasonable control of the cities. 10 It is true that fault in the delay remains a very important factor -- perhaps the most important single factor -- in determining whether neglect is excusable, see United States v. Andrews, 790 F.2d 803, 806 (10th Cir. 1986) (finding excusable neglect where filing delay occurred because defendant was seriously ill, heavily medicated, and not

---

9 The Court in Pioneer also found it relevant to determining the meaning of "excusable neglect" that a flexible understanding of the phrase "accords with the policies underlying Chapter 11 and the bankruptcy rules." Pioneer, 113 S. Ct. at 1495. We see nothing in the policies underlying the Federal Rules of Appellate Procedure which would lead us to a different conclusion as to the meaning of the phrase. See Torres, 487 U.S. at 316 (confirming that "the requirements of the rules of procedure should be liberally construed") (citing Foman v. Davis, 371 U.S. (1962)).

10 It appears that the cities simply mistakenly captioned their first notice of appeal "City of Chanute, Kansas, et al. " rather than naming all plaintiff cities.

represented by counsel), cert. denied, 481 U.S., 1018 (1987); United States v. Twomey, 845 F.2d 1132, 1134 (1st Cir. 1988) (finding excusable neglect where filing delay resulted from actions of postal service or court personnel), and that therefore this case is an arguable one. However, under the entire circumstances of the case and looking to the other three Pioneer factors, the district court acted within its discretion. We see no danger of prejudice to Williams from the delay. The amended notice of appeal was filed only 31 days after the end of the period prescribed for notice of appeal in Fed. R. App. P. 4(a)(1), a very short time in the context of a protracted litigation battle during which the parties have been well aware of each others' identifies. In addition, there is no evidence that the cities acted in other than good faith. We therefore affirm the district court's grant of the cities' Rule 4(a)(5) motion for extension of time to file notice of appeal. The cities' second notice of appeal is effective and all of the city plaintiffs are properly before us.

III. Aware of Attorneys' Fees

The cities argue that the district court erred in denying their motion for attorneys' fees under § 16 of the Clayton Act, 15 U.S.C. § 26 (we refer to this section as "§ 16" in the balance of this opinion), which provides:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, . . . and upon the execution of a proper bond against damages f or an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue. . . . In any action under this section in which the plaintiff substantially

> prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

The cities contend that they have "substantially prevailed" so as to merit attorneys' fees under § 16. They cite two bases for this contention. First, they point to the preliminary injunction issued against Williams by the district court. See Chanute I. Second, they cite their stipulation agreement with Williams granting them certain rights. We find that the cities have not "substantially prevailed" and therefore are not entitled to attorneys' fees under § 16.

A. Applicability of Civil Rights Statute Framework for Award of Attorneys' Fees

Most of the case law on attorneys' fee awards to prevailing parties comes from the civil rights context under 42 U.S.C. § 1988, which provides that "[i]n any action or proceeding to enforce a provision of [enumerated civil rights statutes], the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." This language is very similar, though not identical, to that in § 16 of the Clayton Act (providing for attorneys' fees for "prevailing parties" rather than for a party who "substantially prevails" under § 16). The interpretive framework that has developed around § 1988 illustrates that § 1988 itself effectively entails a "substantially" prevailing party test as is expressly provided for in § 16. See subsection B infra outlining § 1988 fee award framework; see also Maher v. Gagne, 448 U.S. 122, 127 (1980) (approving district court decision which awarded attorneys' fees on the grounds that the plaintiff had received "substantially" the relief sought through a consent decree). Other courts that have considered fee awards under § 16 have done so using the § 1988 analytical framework. See, e.g. Royal Crown Cola Co. v. Coca-Cola Co., 887 F.2d 1480, 1485 (11th Cir. 1989), cert. denied, 497 U.S. 1011 (1990); Southwest Marine, Inc. v. Campbell Indus., 732 F.2d 744, 746-47 (9th Cir.), cert. denied, 469 U.S. 1072 (1984); Grumman Corp. v. LTV Corp., 533 F. Supp. 1385, 1387-88 (E.D.N.Y. 1982). We accept the reasoning of these cases and apply the § 1088 framework to this case.

B. Application of Attorneys' Fee Award Framework

Under 42 U.S.C. § 1988, and by analogy § 16 of the Clayton Act, there are two situations in which ar party is deemed to have sufficiently "prevailed" to qualify for an attorneys' fee award. First, a party must be awarded attorneys' fees where it has received "at least some relief on the merits of [its] claim" by judicial determination. Texas State Teachers Ass'n v. Garland Indep. Sch. Dist., 109 S. Ct. 1486, 1493 (1989). Such relief can under certain circumstances include the grant of a preliminary injunction. See Dahlem v. Board of Educ., 901 F.2d 1508, 1511-1514 (10th Cir. 1990) (finding a preliminary injunction was sufficient relief on the merits to warrant attorneys' fee award under § 1988 where suit was subsequently mooted by passage of time before appeal of the injunction and before full adjudication on the merits). The cities argue, based on our decision in Dahlem, that the district court's grant of a preliminary injunction in Chanute I entitles them to attorneys' fees as prevailing parties in this case.

This argument misses the mark. First, unlike Dahlem where the injunction action was mooted "through no acquiescence by the defendant, while the order was on appeal, " 901 F.2d at 1512, here the injunction action was dismissed because a stipulation agreement was reached. Thus, the case is more appropriately analyzed under the second, "catalyst test" for attorneys fee awards (see below). Further, and most importantly, in Dahlem, because the plaintiff's claim was mooted before appeal of the preliminary injunction or full adjudication, the preliminary injunction represented the final word from the courts on the merit of the case. Here, by contrast, there was an eventual full adjudication on the merits resulting in a rejection of all of the cities' antitrust allegations. See Chanute IV (upholding the district court's dismissal of all claims). 11 The substantive determinations underlying the grant of the preliminary injunction were therefore overturned.

---

11 Though the disposition on the merits in Chanute II, Chanute III, and Chanute IV directly concerned only the cities' action for damages, the rejection of the legal bases of the claims applies equally to any action for injunctive relief.

The Supreme Court's analysis in Hewitt v. Helms, 482 U.S. 755 (1987), is relevant here. In Hewitt, the Third Circuit ruled that plaintiffs constitutional rights had been violated, but remanded the case for qualified immunity analysis. 712 F.2d 48 (3d Cir. 1983). Subsequently, the district court held and the Third Circuit affirmed that qualified immunity shielded the defendants, thereby rejecting the plaintiff's claims on the merits. 745 F.2d 46 (3d Cir. 1984). In holding that the plaintiff was not entitled to attorneys' fees based on the Third Circuit's earlier, favorable statement on the law, the Supreme Court said: "We conclude that a favorable judicial statement of law in the course of litigation that [in the end] results in judgment against the plaintiff does not suffice to render him a 'prevailing party.' Any other result strains both the statutory language and common sense." Id. at 763. Though admittedly a party may receive more tangible short term benefits from a preliminary injunction than from a declaratory statement of the law that has no effect due to qualified immunity, allowing attorneys' fees for a preliminary injunction where the bases for a plaintiff's claims are ultimately rejected where the basis for a plaintiff's claims are ultimately rejected similarly "strains both the statutory language [here of § 16] and common sense." the cities did not receive a judicial determination on the merits warranting the award of attorneys' fees.

A party may also be deemed to have prevailed sufficiently to warrant the award of attorneys' fees under a two part "catalyst test." Under this test a plaintiff must have been a "significant catalyst" causing a defendant to change position, and the defendant's change in position must have been required under law. See Supre v. Ricketts, 792 F.2d 958, 962 (10th Cir. 1986); I&J Anderson, Inc. v. Town of Erie, 767 F.2d 1469, 1474-75 (10th Cir. 1985); Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978) (first establishing the catalyst test).

The cities argue that they are entitled to attorneys' fees under the catalyst test because their litigation caused Williams to enter into a stipulation agreement granting rights to the cities that they otherwise would not have had. Williams disputes these claims. Because the first part of the catalyst test involves primarily factual determinations (largely related to causation), we review the district court's findings under this part only for clear error. Supra, 792 F.2d at 962.

However, we find it necessary to address part one of the test in this case because the cities fail to satisfy part two. Part two of the catalyst test involves questions of law which we review de novo. Id.

The cities fail part two of the catalyst test largely on the same basis that we found them to have failed to obtain a sufficient judicial determination on the merits in part one above. The typical situation in which attorneys' fees are available under the catalyst test occurs where a defendant changes position in response to a suit or the parties reach a settlement agreement resulting in a dismissal of the suit with no further court action. See, e.g., Maher (upholding award of attorneys' fees under catalyst test where case was dismissed due to a settlement agreement); Luethje v. Peavine Sch. Dist., 872 F.2d 352 (10th Cir. 1989) (upholding attorneys' fees award under the catalyst test where employee brought § 1983 action for injunction against school problems and school district subsequently dropped the policy before adjudication). In such cases, under the second prong of the catalyst test we must determine whether the defendant's change in possession in response to the suit was required under law. See, e.g., Supre, 792 F.2d at 962-63 (undertaking analysis determining that defendant's conduct that mooted the suite was not legally required so as to warrant attorneys' fee award).

The case before us is unusual because we have a determination on the legal merits of the cities' claims [12] despite the fact that the parties reached a stipulation agreement resulting in the dismissal of the cities' request for injunctive relief. This makes our task much easier. In Chanute IV we found that the cities' antitrust allegations were without merit. Thus, any change in position by Williams in response to these claims was not required under the antitrust laws upon which the claims were based. We will not reward the cities for any benefits

---

12 Again, it makes little difference that our decision in Chanute IV specifically regarded the cities' action for damages and not for injunctive relief. The underlying legal basis for the cities' request for both remedies was the same.

they achieved (if any) through this litigation where their antitrust allegations were without merit. 13

---

13 The cities point especially to the Ninth Circuit's decision in Southwest Marine, Inc. v. Campbell Indus., 732 F.2d 744 (9th Cir. 1984) (Southwest Marine I), as precedent for the award of attorneys' fees in this case. In Southwest Marine I, the defendants changed position by agreement with the plaintiff, presumably in response to the plaintiff's antitrust suit. After a subsequent trial on the merits of the plaintiff's damages claim and a jury verdict in the plaintiff's favor, the district court entered judgment n.o.v. for the defendants. On appeal, the Ninth Circuit found that, absent further evidence, the plaintiff should prevail on liability. Id. at 747. It reversed and remanded the case for determination of some residual evidentiary questions with regard to liability and then for determination of the amount of damages. Id. The court found further that an attorneys' fee award under § 16 was appropriate based on the defendants' earlier change in position "whether or not plaintiff ultimately prevails on damages on remand." Id. In fact, on remand the plaintiff ultimately lost on liability, Southwest Marine, Inc. v. Campbell Indus., 616 F. Supp. 253 (S.D. Cal. 1985) (Southwest Marine II), yet the Ninth Circuit affirmed its statement regarding plaintiff's entitlement to attorneys' fees, Southwest Marine, Inc. v. Campbell Indus., 796 F.2d 191 (9th Cir. 1986) (Southwest Marine III). It in this language and outcome which the cities focus on to support their motion for attorneys' fees here.

On closer examination of the Southwest Marine litigation, however, we do not find it to support the cities' position. In Southwest Marine I, the Ninth Circuit essentially found the plaintiff's antitrust claims to have legal merit. On remand, the district court dismissed the claims only due to an

(Footnote continued on Following Page)

interim change in the law. See Southwest Marine II. As the

IV. CONCLUSION

We find that the district court did not abuse its discretion in granting the cities extended time to file an amended notice of appeal and therefore that all eight of the city plaintiffs are properly before us in this appeal. Further, we find that the district court properly denied the cities' motion for attorneys' fees.

AFFIRMED.

Ninth Circuit subsequently noted in affirming the defendants' liability for attorneys' fees: "Southwest Marine's decision to institute litigation was neither frivolous nor unreasonable. To the contrary, its legal position at the time it filed its complaint, as well as at the time it accomplished the practical result that underlay our attorneys' fees determination, was supported by the weight of legal authority." Southwest Marine III, 796 F.2d at 292. This is not the situation we face here. Our rejection of the substance of the cities' antitrust claims amounts to a statement that they lacked merit from the inception of the suit, regardless of any preliminary determination by the district court.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CITY OF CHANUTE, KANSAS; CITY OF AUBURN, KANSAS; CITY OF CLEVELAND, OKLAHOMA; CITY OF GARNETT, KANSAS; CITY OF HUMBOLDT, KANSAS; CITY OF IOLA, KANSAS; CITY OF NEODESHA, KANSAS; CITY OF OSAGE, KANSAS,	)	
Plaintiffs-Appellants,	)	No. 93-3101 93-3125
v.	)	
WILLIAMS NATURAL GAS COMPANY,	)	
Defendant-Appellee.	)	

ORDER
Entered September 8, 1994

Before SEYMOUR, Chief Judge, LOGAN, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, KELLY, HENRY, Circuit Judges, and ROSZKOWSKI,* District Judge.

---

*Honorable Stanley J. Roszkowski, Senior District Judge, United States District Court for the Northern District of Illinois, sitting by designation.

This matter comes on for consideration of appellants' petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court
PATRICK FISHER,
Chief Deputy Clerk
By JIM POWERS,
Deputy Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

CITY OF CHANUTE, KANSAS; CITY OF AUBURN, KANSAS; CITY OF CLEVELAND, OKLAHOMA; CITY OF GARNETT, KANSAS; CITY OF HUMBOLDT, KANSAS; CITY OF IOLA, KANSAS; CITY OF NEODESHA, KANSAS; CITY OF OSAGE, KANSAS,	)	
Plaintiffs-Appellees,	)	No. 88-1225
vs.	)	(D.Ks. 87-1463-K)
WILLIAMS NATURAL GAS COMPANY,	)	
Defendant-Appellant,	)	
INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA,	)	
Amicus Curiae.	)	

July 26, 1988
Before Honorable James K. Logan, Honorable Deanell R. Tacha and Honorable Wade Brorby, Circuit Judges

This matter comes on for consideration of a Stipulation filed by the parties.

The captioned appeal was scheduled for oral argument at the July 1988 Session.

Upon consideration whereof, the Stipulation is approved. This appeal is dismissed.

The February 5, 1988 Order of the district court granting Plaintiffs' motion for preliminary injunction is vacated.

The March 28, 1988 Order of this Court staying the preliminary injunction is vacated.

ROBERT L. HOECKER
Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

CITY OF CHANUTE, KANSAS, *et al.*,	)	
	)	
Plaintiffs-Appellees,	)	
	)	
vs.	)	No. 88-1225
	)	
WILLIAMS NATURAL GAS COMPANY,	)	
	)	
Defendant-Appellant.	)	

Appeal from Preliminary Injunction issued by the United States District Court for the District of Kansas (Kelly, J.)

STIPULATION

WHEREAS, the U.S. District Court for Kansas entered a preliminary injunction on February 5, 1988, directing Williams Natural Gas Company ("WNG") to open access to its pipeline to the eight plaintiff Cities for the transport of third-party gas (Case No. 87-1463-K);

WHEREAS, WNG appealed the injunction to the U.S. Court of Appeals for the Tenth Circuit and the said Court stayed the injunction pending appeal (Case No. 88-1224);

WHEREAS, on July 20, 1988, WNG accepted a blanket open-access certificate under section 7 of the Natural Gas Act to implement the FERC's approval of WNG's Revised Stipulation and Agreement;

WHEREAS, WNG will provide, and the Cities wish to obtain from WNG, firm and/or interruptible transportation service for 100% of their natural gas requirements, in lieu of full requirements or other sales service;

NOW THEREFORE, WNG and the Cities agree as follows:

1. This Stipulation shall be treated as WNG's commitment to provide the Cities with firm and/or interruptible transportation service in accordance with WNG's FERC tariff;

2. WNG will dismiss its appeal;

3. The Cities will withdraw their motion for preliminary injunction;

4. WNG and the Cities hereby agree mutually to terminate all sales contracts between them that have not already expired, and the Cities agree not to oppose abandonment of sales service in proceedings to be initiated by WNG before the FERC;

5. The Cities shall be subject to only those charges and procedures for interruptible and/or firm transportation services they receive as are contained in the rates and procedures in WNG's transportation tariffs on file with the FERC from time-to-time; and

6. . . . The Cities shall, by July 29, 1988, and thereafter from time-to-time, submit to WNG appropriate requests for firm and/or interruptible transportation service, and thereafter the Cities may submit changes in such service or additional receipt and/or delivery points. Upon receipt of the Cities' service requests, WNG shall submit to the Cities or their agent appropriate transportation contract(s) in accordance with WNG's FERC tariff. The Cities may assign interruptible transportation to an agent for the purpose of pooling.

IN WITNESS WHEREOF, counsel of record for the parties have executed this Stipulation this 22nd day of July, 1988.

Charles F. Wheatley, Jr.
Counsel for the Cities

John T. Schmidt
Counsel for WNG

Supreme Court, U.S.
FILED

941185 DEC 7 1994

OFFICE OF THE CLERK

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

CITIES OF CHANUTE, AUBURN, GARNETT, HUMBOLDT, IOLA, NEODESHA, OSAGE CITY, KANSAS AND CLEVELAND, OKLAHOMA
Petitioner,

v.

WILLIAMS NATURAL GAS COMPANY,
Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

ROBERT PENNINGTON
HENSHALL PENNINGTON & BRAKE
101 West Main Street
P. O. Box 667
Chanute, KS 66720
(316) 431-2600

LARRY D. HENDRICKS
STUMBO, STUMBO, HANSON & HENDRICKS
2887 S.W. MacVicar Ave.
Topeka, KS 66611
(913) 267-3410

CHARLES F. WHEATLEY, JR. *
DON CHARLES UTHUS
TIMOTHY P. INGRAM
WHEATLEY & RANQUIST
34 Defense Street
Annapolis, MD 21401
(410) 266-7524
(301) 261-8608

Counsel for Petitioners

**Counsel of Record*

January 5, 1995

INDEX TO SUPPLEMENTAL APPENDIX

Page No.

City of Chanute, Kansas, et al. v.
Williams Natural Gas Co.
Memorandum and Order
No. 87-1463-PFK (D. Ct. Kan. February 18, 1993) 25a

City of Chanute, Kansas, et al. v.
Williams Natural Gas Co.
Memorandum and Order
No. 87-1463-K (D.Ct. Kan. February 5, 1988) 31a

820 F.Supp. 1290

CITY OF CHANUTE, KANSAS, et al.,
v.
WILLIAMS NATURAL GAS COMPANY.

No. 87-1463-PFK.

United States District Court,
D. Kansas.

Feb. 18, 1993.
MEMORANDUM AND ORDER

PATRICK F. KELLY, Chief Judge.

On February 8, 1993, this matter came on for arguments on plaintiffs' motion for attorneys' fees and costs pursuant to § 16 of the Clayton Act. The court announced its full findings of fact and conclusions of law from the bench and now enters this memorandum and order in accordance therewith.

Plaintiffs (Cities), a group of eight cities, brought this action against Williams Natural Gas (WNG) seeking to force WNG to open its gas lines to transport gas from other suppliers. WNG had temporarily opened its lines, from December 1986 to August 1,1987. Two days after WNG closed its lines the Cities filed this suit seeking injunctive relief and alleging violations of the Sherman Antitrust Act. The Cities' request for a temporary injunction was denied. This court, however, granted a preliminary injunction on February 5, 1988. *City of Chanute, Kan. v. Williams Natural Gas Co.*, 678 F.Supp. 1517 (D.Kan.1988) *(Chanute I)*.

WNG filed a notice of appeal to the Tenth Circuit on February 12, 1988. On March 3 and 28, 1988, the Tenth Circuit granted a stay of the injunction pending appeal on the merits. Just prior to the scheduled date for oral argument, the Federal Energy Regulatory Commission (FERC) approved WNG's revised stipulation and agreement (RS & A). (Pltfs.' Appendix, Ex. 8.) This approval cleared the way for WNG to

become a nondiscriminatory, open-access transporter under a permanent, FERC-approved program on July 20, 1988. WNG had been working with FERC toward the approval of such a program since before this action was filed by the Cities. WNG notified the Tenth Circuit of the approval of the RS & A by filing a suggestion of mootness. At oral argument, the Tenth Circuit panel asked the parties to attempt to reach an agreement on whether the preliminary injunction had become moot. The Tenth Circuit panel also announced its intention to remand the mootness issue for further consideration by this court if the parties were unable to agree.

On July 22,1988, WNG and the Cities filed with the Tenth Circuit a stipulation that refers to the July 20,1988 acceptance by WNG of a blanket open-access certificate under § 7 of the Natural Gas Act, thereby implementing the FERC's approval of WNG's RS & A. The stipulation further provides: "WNG will provide, and the Cities wish to obtain from WNG, firm and/or interruptible transportation service for 100% of their natural gas requirements, in lieu of full requirements or other sales service." (Stipulation, Pltfs.' Appendix, Ex. 1 at 2-3.) The stipulation also states WNG will dismiss its appeal and the Cities will withdraw their motion for preliminary injunction.

Following the dismissal of the appeal, the case returned to this court for a decision on the merits. After discovery, WNG filed a series of motions for summary judgment. The court granted these motions. *See City of Chanute v. Williams Natural Gas Company*, 1990-1 Trade Cas. ¶ 68,967, 1990 WL 20019 (D.Kan. 1990) *(Chanute II); City of Chanute v. Williams Natural Gas Company*, 743 F.Supp. 1437 (D.Kan. 1990) *(Chanute* III). Together, these two orders dismissed all of the Cities' claims, and the court entered judgment in WNG's favor on July 30, 1990. The Tenth Circuit affirmed. *City of Chanute v. Williams Natural Gas*, 955 F.2d 641 (10th Cir.), *cert. denied*, ____U.S. ____, 113 S.Ct. 96, 121 L.Ed.2d 57 (1992) *(Chanute IV).*

This action is now before the court on the Cities' motion for attorneys' fees and costs pursuant to § 16 of the Clayton Act. The Cities claim WNG should be ordered to pay between $650,000 and $837,000 for attorneys' fees. On December 30, 1992, the parties moved to bifurcate the Cities' request for fees. The court granted this motion, and

therefore, the issue of whether the plaintiffs are entitled to attorneys' fees and costs will be addressed here.

Section 16 of the Clayton Act, 15 U.S.C. § 26 provides in pertinent part: "In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff." The Cities claim they substantially prevailed because they were granted a preliminary injunction, and that the injunction motivated WNG to agree to provide firm and/or interruptible transportation service for 100% of their natural gas requirements. Next, the Cities argue that because they substantially prevailed, the court has no discretion in this matter and must award costs including attorney fees.

The Cities cite many civil rights cases for support of their contention that they meet the definition of a substantially prevailing plaintiff. Analogies have been drawn between 15 U.S.C. § 26 and 42 U.S.C. § 1988. *F. & M. Schaefer Corp. v. C. Schmidt & Sons, Inc.*, 476 F.Supp. 203, 205-06 (1979). *See also Royal Crown Cola Co. v. Coca-Cola Co.*, 887 F.2d 1480 (11th Cir.1989), *reh'g denied*, 897 F.2d 537, *cert. denied*, 497 U.S. 1011, 110 S.Ct. 3258, 111 L.Ed.2d 767 (1990). In cases involving claims under the Clayton Act, courts have stated the appropriate test for "determining which party prevailed are a) the situation immediately prior to the commencement of the suit, and b) the situation today, and the role, if any, played by the litigation in effecting any changes between the two." *F. & M. Schaefer Corp.*, 476 F.Supp. at 206. Or put another way, " 'a plaintiff must show at minimum that the prosecution of the action could reasonably have been regarded as necessary and that the action had substantial causative effect on [the desired result].' " 476 F.Supp. at 206 n. 3 (quoting *Vermont Low Income Advocacy Council v. Usery*, 546 F.2d 509 (2d Cir. 1976)).

In *Royal Crown Cola Co. v. Coca-Cola Co.*, the court stated the plaintiff bears the burden of proving it is a prevailing party as the term is used in § 16 of the Clayton Act. The court further stated " 'a plaintiff must receive at least some relief on the merits of the claim."' *Royal Crown*, 887 F.2d at 1485-86 (quoting *Hewitt v. Helms*, 482 U.S. 755, 107 S.Ct. 2672, 96 L.Ed.2d 654 (1987)). In *Royal Crown*, the court found the plaintiff failed this test because it had been granted a TRO to

maintain the status quo that was later extended to a preliminary injunction due to a scheduling problem. A hearing on the merits was never conducted.

The court's inquiry in *Royal Crown*, however, was not complete. The court went on to state that even when the plaintiff has not received judicial relief on the merits, the plaintiff may be entitled to fees and costs if its lawsuit caused or prompted some remedial action by the defendant. The court first looked at whether the plaintiff's goals were accomplished. Next, the court reviewed the chronology of events and stated: "While the chronology of events is important, it is not definitive because the question of causation is intensely factual." 887 F.2d at 1487. In other words a pure *post hoc ergo propter hoc* analysis is not appropriate. Thus, the plaintiff must provide some evidence that proves its litigation efforts were in some way the cause or a catalyst for the ultimate result. *See also Texas State Teachers Assn. v. Garland Independent School Dist.*, 489 U.S. 782, 792-93, 109 S.Ct. 1486, 1493-94, 103 L.Ed.2d 866 (1989) ("The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties .... "); *Rhodes v. Stewart*, 488 U.S. 1, 3, 109 S.Ct. 202, 203,102 L.Ed.2d 1 (1988) (the entry of a declaratory judgment in a party's favor does not automatically render it a prevailing party under § 1988); *Hewitt v. Helms*, 482 U.S. 755, 761,107 S.Ct. 2672, 2676, 96 L.Ed.2d 654 (1987) (the plaintiff must prove "the settling of some dispute which affects the behavior of the defendant toward the plaintiff.").

Plaintiffs argue the stipulation filed with the Tenth Circuit gave the Cities more rights than they were allowed pursuant to the RS & A as approved by the FERC. For example, the RS & A allowed a distributor customer, such as the Cities, to sign a new agreement with WNG that permitted the distributor customer to convert to firm transportation service (rather than sales service) at a specified percentage rate over a four-year period. (RS & A at 8-12, Pltfs.' Appendix, Ex. 2.) In contrast, the stipulation allowed the Cities to obtain immediate firm or interruptible transportation service for 100% of their natural gas requirements from WNG. The Cities claim this difference is due to the pressure of their litigation on WNG and demonstrates WNG's acquiescence in the preliminary injunction.

The Cities cite *Farrar v. Hobby*, _____ U.S. _____, 113 S.Ct. 566, 121 L.Ed.2d 494 61 U.S.L.W. 4033; 60 Fair Empl. Prac. Cases (BNA) 633 (1992), for its application of the term "prevailing party." In *Farrar*, the plaintiffs brought a suit under 41 U.S.C. § 1983 and 1985 claiming a violation of their civil rights and seeking damages of $17 million. Ultimately, plaintiffs only succeeded in a jury finding that one defendant violated their civil rights, for which they received a nominal award of one dollar. ____ U.S. at ____, 113 S.Ct. at 571. The Court held a plaintiff who wins nominal damages is a prevailing party under § 1988. Thus, the plaintiffs were owed reasonable attorney fees as determined by the district court when considering the circumstances of the case.

Farrar can be easily distinguished from the case currently under consideration. There, the jury found a defendant had violated plaintiffs' right to procedural due process. Here, the court held WNG had not violated the Sherman Act and all of the Cities' claims failed on the merits.

WNG argues that the Cities did not substantially prevail. WNG was already in the process of getting an open-access certificate pursuant to § 7 of the Natural Gas Act at the time this action was filed. *See* RS & A at 1 (original stipulation and agreement was filed July 18,1986). Open-access transportation became available as soon as the FERC granted the necessary certificate. Although the Cities were granted a preliminary injunction, it was granted because the Cities presented questions going to the merits that were considered serious and substantial and because this court determined the preliminary injunction would preserve the status quo. *Chanute I*, 678 F.Supp. at 1525-26. Furthermore, the Cities did not receive any natural gas from other suppliers, via WNG lines, pursuant to the preliminary injunction because the Tenth Circuit granted WNG a stay pending WNG's appeal. Finally, the Cities lost every one of their antitrust claims on the merits. *See Chanute II; Chanute III; Chanute IV.*

The court reviewed the briefs filed by the parties and considered the evidence presented at hearing. At the time of the hearing on whether to issue a preliminary injunction, representatives of WNG testified that they were trying to negotiate a blanket open-access certificate under § 7 of the Natural Gas Act. They further assured the court that when

appropriate approval had been received from the FERC, WNG would provide the transportation service sought by the Cities. Once the RS & A was approved and the certificate received, WNG provided transportation service as stated in the stipulation. The Cities have failed to prove their litigation influenced the relationship between WNG and the Cities or affected WNG's behavior toward the Cities. Therefore, this court holds the Cities did not substantially prevail and are not entitled to attorneys' fees and costs pursuant to § 16 of the Clayton Act.

IT IS ACCORDINGLY ORDERED this 18th day of February, 1993, that plaintiffs' motion for attorneys' fees and costs (Dkt. No. 300) is denied.

CITY OF CHANUTE, KANSAS; City of Auburn, Kansas; City of Cleveland, Oklahoma; City of Garnett, Kansas; City of Humboldt, Kansas; City of Iola, Kansas; City of Neodesha, Kansas; and City of Osage, Kansas, Plaintiffs,

v.

WILLIAMS NATURAL GAS COMPANY, Defendant.

No. 87-1463-K.

United States District Court,
D. Kansas.

Feb. 5, 1988.

On Motion to Modify Feb. 9, 1988.

MEMORANDUM AND ORDER

PATRICK F. KELLY, District Judge.

Plaintiffs, Cities of Chanute, Auburn, Garnett, Humboldt, Iola, Neodesha, and Osage City, Kansas, and Cleveland, Oklahoma ("Cities"), seek an injunction compelling defendant Williams Natural Gas Company ("Williams" or "WNG") to permanently open access to its interstate natural gas pipeline which is connected to each of the plaintiff Cities. The Cities allege Williams' failure to open access to its pipeline to alternate suppliers of natural gas constitutes an intentional monopoly in violation of § 2 of the Sherman Act, 15 U.S.C. § 2.

This action was filed on August 3, 1987, and on August 7, 1987 a hearing was held before the Honorable Frank G. Theis on plaintiffs' motion for a temporary restraining order. In a ruling from the bench, Judge Theis denied the plaintiffs' motion. The Cities subsequently filed the motion for preliminary injunction now pending before this court.

A hearing on the preliminary injunction motion was held on October 20-23, 27-28 and November 16-19, 1987 (hereafter referred to as "hearing"). After the hearing, the parties submitted extensive briefs detailing their proposed findings of fact and conclusions of law. Final oral argument on the motion was held January 25, 1988, at which time the court announced that it would grant the requested injunction. However, the court stated the injunction would not take effect until it issued a full written memorandum and order. Accordingly, the court is now prepared to make written findings and conclusions on the plaintiffs' motion for a preliminary injunction.

Factual Background

Plaintiff Cities are each municipalities with their own natural gas distribution systems. The Cities purchase natural gas at wholesale and then resell it to residential, commercial and industrial customers within the Cities and surrounding areas.

Defendant Williams Natural Gas is a Delaware corporation with its principal place of business in Tulsa, Oklahoma. Williams is engaged in the business of interstate sale and transportation of natural gas, and as such is regulated by the Federal Energy Regulatory Commission ("FERC" or "the Commission"). Williams obtains gas from producing fields in various states, transmits the gas to its service areas, and delivers it to customers in Kansas, Oklahoma, Missouri and Nebraska. Williams' customers are primarily of two types: (1) local distribution companies ("LDCs"), such as the plaintiff Cities, which purchase gas from WNG at a "margin" or "markup", and resell the gas to the ultimate consumers; and (2) industrial gas users which purchase gas directly from WNG.

Each of the plaintiff Cities in this action can be characterized as an "LDC" and has or has had a "full requirements" contract with WNG. Under such contracts, the Cities must purchase all of their gas requirements from WNG, and WNG must maintain sufficient gas reserves to meet those requirements. For purposes of this case, there are essentially two types of rates and services available to the Cities under "full requirements" contracts: firm service (F-2 rates — $3.16 and $3.26/mcf), which is primarily for residential customers; and large

industrial service (I-2 rates - 2.75/mcf). Under either service, the gas is purchased by the Cities for resale to residential and industrial users.

In addition to these full requirements contracts, all of the Cities, except Auburn and Cleveland, have direct sale contracts with WNG to purchase gas for delivery to and use by the Cities in their municipal electric power plants. These contracts are known as "interruptible service" contracts and differ substantially from "full requirements" contracts. Interruptible service is provided on a "when available" basis, and accordingly, may be interrupted during periods when demand for gas is greatest. Further, either party can terminate such contracts upon 30 days' notice.

With the exception of the cities of Cleveland and Garnett, all of the plaintiff Cities currently have "full requirements" contracts in place with WNG, and the parties continue to operate under those contracts. Cleveland and Garnett's contracts with WNG expired by their own terms in May of 1987. [1] However, those two cities continue to purchase natural gas from WNG under the full requirements resale service provided under WNG's FERC certificate and tariff.

WNG's pipeline is the only major interstate pipeline serving plaintiff Cities, and prior to December, 1986, other natural gas suppliers did not have access to Williams' pipeline. However, prompted by the FERC's issuance of Order No. 436 (see discussion at pp. 12-14), WNG opened its pipeline to transportation gas on an interim basis on December 22, 1986. Under this "open-access" system, the Cities had an opportunity to purchase natural gas from third parties (e.g., other producers and marketing companies) and have that gas transported over WNG's pipeline. In return for transporting the gas, Williams received a fee called a "transportation rate". In order that the Cities could purchase gas from other sources, FERC temporarily waived its certificate and tariff

---

1 Williams' firm service contracts with Chanute, Humboldt and Neodesha will expire on April 22, 1988. The Osage City contract expires August 22, 1989, while Iola's contract expires December 22, 1989. Auburn's contract is the last to expire, on December 22, 1990.

provisions and Williams temporarily waived its "full requirements" contract provisions with the Cities.

Thus, while the "full requirements" provisions were waived, WNG's customers (including the plaintiff Cities) were free to replace all or any part of the gas they normally purchased from WNG with third party gas.

By April of 1987, WNG's customers were purchasing from third parties large volumes of gas previously purchased from WNG. WNG's vice president of marketing and supply, Jack Finch, testified at the hearing that by July of 1987, 80% of WNG's sales of system supply gas had been converted to transportation. Finch further testified that as a result of the reduced sales, WNG's "take-or-pay" exposure increased dramatically during the period of open access. (Note: "take-or-pay" contracts between pipelines and producers commonly require a pipeline to pay for a specified percentage of delivered gas whether or not it is in fact taken).

Despite increasing take-or-pay exposure, WNG was able to keep the pipeline open until August 1, 1987, by negotiating with its producers (primarily Amoco Oil Company) for take-or-pay relief.

During the period of interim open access, each of the plaintiff Cities obtained gas from Vesta Energy Company ("Vesta"), a marketing company engaged in the sale at the wellhead of natural gas supplies. Some of the Cities contracted directly with Vesta while others contracted with a consultant, Leo Edison, who, in turn, contracted with Vesta. The contracts were of varying terms and duration but can be generally categorized as follows:

Cleveland

On December 9, 1986, the City of Cleveland, Oklahoma entered into a "natural gas sale agreement" with Leo Edison, whereby the City agreed to purchase gas from Edison for a period of five years at a specified price of $2.17/mcf, and thereafter at $.50/mcf less than the price of WNG's gas. Pursuant to a written transportation agreement, WNG commenced

transportation of that third party gas to the City of Cleveland in February, 1987.

Auburn, Humboldt, Iola and Osage City

The Cities of Auburn, Humboldt, Iola and Osage City also commenced the purchase of third party transport gas in June and July of 1987 under gas purchase agreements with Leo Edison. These agreements were of short-term duration ending in September or October of 1987, or were month-to-month arrangements which could be cancelled by either party on 30 days' notice. The gas purchased by these Cities was transported by WNG under written transportation agreements with each City.

The source of supply for Edison's contracts with the City of Cleveland, as well as with the Cities of Auburn, Humboldt, Iola and Osage City, was a five-year contract between Edison and Vesta. The contract provided for a base price of $1.50/mcf at the delivery point, to be adjusted every six months based on 70% of the increase or decrease in WNG's average resale price to its customers.

Neodesha, Garnett and Chanute

The Cities of Neodesha, Garnett and Chanute also commenced transportation under WNG's interim open-access program in June, 1987, pursuant to written transportation agreements with WNG and direct sale agreements with Vesta. The City of Chanute purchased gas from Vesta under a month-to-month arrangement while the City of Neodesha purchased gas from Vesta under an agreement covering the months of June and July, 1987 (Pltfs' Ex. 5). The City of Garnett's agreement with Vesta covered only the month of June, 1987. While none of these three cities actually entered into a long-term contract with Vesta, the evidence at the hearing showed that negotiations for a long-term arrangement had been completed between these cities and Vesta when WNG announced the closing of its pipeline effective August 1, 1987. Vesta's vice president of gas sales, David Tudor, testified that except for the starting price, the terms of the long-term agreement contemplated by these three cities and Vesta were identical to the terms of the Vesta/Edison agreement. Tudor

further testified that the contracts were not formalized because of uncertainty as to how long WNG would keep its pipeline open.

To summarize, at the time WNG closed its pipeline, the City of Cleveland, Oklahoma, and the Cities of Auburn, Humboldt, Iola and Osage City, Kansas, had available a long-term, low-cost supply of Vesta gas. While the Cities of Garnett, Neodesha and Chanute had no long-term contract in effect with either Vesta or Edison, the essential terms of such a contract had been agreed upon.

When WNG closed its pipeline on August 1, 1987, the Cities were again required to purchase gas from Williams at a price substantially higher than the price of gas available to them through Vesta. The Cities subsequently filed the instant action, alleging WNG's refusal to open the pipeline constitutes monopolization in violation of § 2 of the Sherman Act, 15 U.S.C. § 2, and seeking an injunction ordering WNG to open access to its pipeline to the plaintiff Cities.

Economic and Regulatory Environment

It is clear to the court that any analysis of this case must take into account the economic and regulatory environment in which the parties were operating. Accordingly, prior to discussing the elements required to issue a preliminary injunction, and whether plaintiffs have met those elements, the court first briefly summarizes relevant regulatory actions and their impact upon the natural gas industry, with particular emphasis on their effect upon the parties to this action.

Since the enactment of the Natural Gas Act of 1938, 15 U.S.C. § 717 *et seq.*, the natural gas industry has undergone substantial and complicated changes. Yet the fundamental goal of the NGA is still intact—that being to protect consumers from exploitation at the hands of natural gas companies. *FPC v. Hope Natural Gas* Co., 320 U.S. 591, 610, 64 S.Ct. 281, 291, 88 L.Ed. 333 (1944); *Associated Gas Distributors v. F.E.R.C.*, 824 F.2d 981, 995 (D.C. Cir. 1987). Under the NGA, the Federal Power Commission (the predecessor to FERC) set price ceilings for sales from producers to pipelines and also regulated the prices pipelines could charge to their downstream customers. *Transcontinental Pipe Line v. Oil & Gas Bd.*, 474 U.S. 409, 420,106

S.Ct. 709, 715-16, 88 L.Ed.2d 732 (1986). However, the price of interstate gas at the wellhead was fixed well below market and a discrepancy developed between the price for interstate gas and unregulated intrastate gas, and gas production was withheld from the interstate market. *Maryland People's Counsel v. F.E.R.C.*, 761 F.2d 768, 770 (D.C. Cir. 1985).

By the early 1970s, a serious gas shortage had developed, apparently caused in part by an imbalance between supply and demand brought on by the NGA's artificial pricing scheme. Thus, in 1978, Congress enacted "a new system of natural gas pricing" under the Natural Gas Policy Act ("NGPA"), 15 U.S.C. § 3301 *et seq. Transcontinental Pipe Line v. Oil & Gas Bd.*, 474 U.S. at 421, 106 S.Ct. at 716.

In the NGPA, Congress substantially terminated the Commission's wellhead price regulation by defining eight categories of natural gas production and setting ceiling prices for "first sales" in each category. 15 U.S.C. §§ 3311-33. [2]

The effect of the NGPA on producers, as compared to interstate pipelines, has been summarized by FERC as follows:

> As a direct result of the NGPA, ... a natural gas producer can now sell "new" gas to any purchaser—an intrastate pipeline, an interstate pipeline, a local distribution company served by an intra- or interstate pipeline, an end user, a nonprofit consumer cooperative or what have you—without federal restrictions as to

---

2 The NGPA provided for the almost immediate deregulation of certain "high cost" gas, while for most "new gas" it established new ceilings and provided for gradual increases until scheduled deregulation on January 1, 1985 or July 1, 1987. The NGPA did not deregulate "old" interstate gas, but instead provided for adjustment of the price ceilings for inflation and authorized the Commission to raise former ceilings to higher "just and reasonable" levels. *Associated Gas Distributors v. F.E.R.C.*, 824 F.2d at 994.

> market entry, market exit or price attaching to the sale. Similarly, an independent marketer can acquire a portfolio of gas purchase agreements and sell gas supply to any person, again without coming under any market entry, market exit or price regulation over the sale. In short, with respect to sales of the commodity by producers or marketers, Congress removed controls in recognition of the competitive nature of the commodity market for gas.
>
> An interstate pipeline, however, seeking to sell gas from its system supply (a commingled stream of gas that was at the wellhead both NGA-jurisdictional and NGA-nonjurisdictional) is subject to the full panoply of statutory regulation governing market entry, market exit and price....
>
> The rationale for maintaining utility-type market entry, exit, and price regulation over the sales for resale of interstate pipelines while removing that regulation for similar sales by other market entities is only implicit in the NGPA but appears plain enough: While Congress concluded that gas production was sufficiently competitive to remove regulation, the control which interstate pipelines exercised over transportation still conferred on them the same kind of market power over their customers as had existed at the time of enactment of the NGA.

Order No. 436, 50 Fed. Reg. 42,408, 42,418 (1985) (footnotes omitted).

Thus, interstate pipelines, like WNG, are still subject to pervasive regulation by FERC. For instance, pipelines must secure a certificate of convenience and necessity prior to performing any significant act—e.g., construction of new facilities or initiation of new transportation service or new sales for resale. 15 U.S.C. § 717f(c). Pipelines also must obtain commission approval when they abandon any "certificated" facility, transportation or sale. 15 U.S.C.§ 717f(b). Additionally, the commission limits to "just and reasonable" levels the prices at which the interstate

pipelines sell gas for resale or provide transportation services. 15 U.S.C. § 717c(a).

During the natural gas shortage which occurred in the 1970s, pipelines were encouraged by the commission to develop supply reserves and enter into long-term contracts with producers. The long-term contracts commonly incorporated high prices (and provisions for escalation upward) as well as "take-or-pay" provisions, requiring pipelines to either take some specified percentage of the deliverable gas, or to make "prepayments" for that percentage anyway. *Associated Gas Distributors v. F.E.R.C.*, 824 F.2d at 995-96, 1021.

It was during this period of time that Williams Natural Gas acquired extensive new gas reserves from Amoco Production Company in the Wamsutter and Moxa regions of Wyoming, most of which contained high NGPA incentive prices. WNG was able to add this high-priced gas to its system and still sell it at a competitive price by "rolling in" the cost of the high-priced Wyoming gas with the cost of inexpensive "old gas" (e.g., from the Hugoton field) to reach a relatively low weighted average cost of gas (WACOG).

However, by 1982 the combination of a number of factors (including energy conservation, mild winters and lower prices of competing fuels such as petroleum) resulted in falling gas prices and a natural gas surplus. Further, various economic factors raised the wellhead price of gas. Producers of gas, responding to high prices and high take-or-pay terms, continued to develop new supply sources of gas. But since gas demand had fallen off, and the market could not absorb supplies at prevailing prices, a surplus of gas deliverability resulted. Thus, producers sought open access to pipeline transportation as an alternative to pipeline sales for marketing their gas. Moreover, purchasers of natural gas sought to purchase gas directly from the producer and have it transported in competition with the system supplies the pipeline retained under uneconomic long-term contracts. Finally, interstate pipelines, seeking new markets and lower prices for both surplus gas supplies and surplus pipeline capacity, expressed reluctance to provide transportation services to other suppliers, particularly where transportation of gas would displace the pipeline's own sales volumes, subjecting the pipeline to substantial take-or-pay exposure.

Order No. 436

In response to these conditions, FERC promulgated Order No. 436, 50 Fed. Reg. 42,408 (1985), (codified at various sections of C.F.R.). This order was motivated by the Commission's determination that the pipelines' refusal to transport gas for third parties had caused serious market distortions.

The essence of Order No. 436 is "a tendency, in the industry metaphor, to 'unbundle' the pipelines' transportation and merchant roles." *Associated Gas Distributors v. F.E.R.C.*, 824 F.2d at 994. While Order No. 436 is a highly complex order, it basically imposes open access commitment on any pipeline that (l) secures a "blanket certificate" to provide gas transportation pursuant to § 7 of the NGA, 15 U.S.C. § 717f, or (2) actually provides transportation under § 311 of the NGPA, 15 U.S.C. § 3371. It further provides that if a pipeline holds itself out as a transporter of gas for others, the pipeline's LDC customers then have an opportunity to convert their existing contract demand ("CD") from an obligation to purchase gas to an obligation to use (or pay for) transportation services.

In *Associated Gas Distributors v. F.E.R.C.*, 824 F.2d 981, the District of Columbia Circuit Court of Appeals upheld the substance of Order No. 436, but recognized that FERC had failed to deal with the problem of uneconomic take-or-pay contracts between pipelines and producers. Accordingly, the court remanded Order No. 436 to the Commission with the directive to determine to what extent certain policy considerations may justify the Commission's inaction on the uneconomical producer-pipeline contracts. 824 F.2d at 1030.

As has already been discussed, WNG commenced interim open access on December 23, 1986, in response to FERC's issuance of Order No. 436. By July, 1986, WNG had filed with FERC an Order 436 "Stipulation and Agreement" which detailed Williams' plans for a permanent open-access program. FERC approved Williams' stipulation and agreement on February 20, 1987, subject to substantial modifications and conditions. Williams found these conditions unacceptable, however, and began revising its stipulation and agreement. In October of 1987, a revised stipulation and agreement was distributed to WNG's customers

and submitted for Commission approval. At this time, the Commission has still not approved WNG's permanent open-access proposals, and WNG is no longer operating under the interim open-access program.

Order No. 451

On June 6, 1986, FERC issued Order No. 451, 51 Fed. Reg. 22,168 (1986). Order No. 451 established procedures for the renegotiation of low, old, pre-NGPA gas prices and the release of gas covered by such pre-NGPA gas purchase contracts. 18 C.F.R. § 270.201 (1987). [3]

The Commission issued Order No. 451 in an attempt to revise its methodology of regulating producer sales of "old gas" in response to changes in market conditions. The Commission also recognized that the existing rate structure for old flowing gas had created at least three problems for natural gas consumers:

> First, the existing rates for most old gas are below the replacement cost of gas reserves.... Most producers of old gas are not receiving revenues equivalent to the marginal costs of replacing depleted old gas reserves, and gas reserves are being consumed faster than they are being replaced....
>
> Second, the existing rates for old, flowing gas vary widely by vintage, based on the date of its dedication to interstate commerce. The overall prices consumers pay for gas depend directly on the access of their pipeline suppliers to these cheaper vintages of gas. Therefore, wide variations in pipeline access to old gas have created huge disparities in the prices consumers pay for gas at the burner-tip around the country....
>
> Third, the pricing of old, flowing gas below replacement cost gives pipelines with large "cushions" of such gas the ability to "roll-in" their prices of new and deregulated gas with artificially

---

3 A case seeking review of Order No. 451 is currently pending before the Fifth Circuit Court of Appeals. *See Mobil Oil Exploration Co. v. F.E.R.C.*, Case No. 86-4940.

> low old gas prices. This allows the pipelines to effectively subsidize the prices of new and deregulated gas above what consumers would otherwise be willing to pay, and therefore frustrates the efficient working of competitive wellhead markets.

51 Fed. Reg. at 22,172.

Order No. 451 establishes a single alternative ceiling price for categories of "old gas" committed or dedicated to interstate commerce before enactment of the NGPA, and eliminates the various ceiling prices for different "vintages" of old gas previously set according to when the gas reserves were produced.

However, before a producer may collect a higher price for its old gas under an existing contract, it must first enter into what is known as a "good faith negotiation" ("GFN") process with the purchaser. Under the GFN process, a producer is permitted to abandon a contract only if the producer first seeks a higher price for its old gas, is unable to agree with the purchaser on a suitable price, and finds another purchaser. 18 C.F.R. § 270.201(b) & (c) (1987). Further, if a tentative new purchaser is not a firm sales customer of the existing purchaser, and the existing purchaser is not an open-access transporter under Order No. 436, firm sales customers of the existing purchaser have a right of first refusal. 18 C.F.R. § 270.201(g) (1987). Finally, interstate pipelines that are not open access transporters under the provisions of Order No. 436 will be granted blanket transportation certificates and will be deemed to have agreed to deliver on behalf of any shipper any gas released under this rule to any of its existing customers or interconnected pipelines. 18 C.F.R. § 270.201(h) (1987). Thus, while pipelines will not become open-access transporters by virtue of such transportation, they may be obligated to transport gas to their own customers under certain conditions.

As for the instant case, testimony at hearing indicated that several producers have entered into or completed the GFN process with WNG, and "451 gas" released pursuant to those negotiations has been made available to the Cities in at least three instances. Specifically, since June of 1987, Cabot Petroleum Corporation, Dakar Operating Company, and Mesa Petroleum have offered 451 gas to the Cities.

The Cities declined to accept the Cabot offer because it was for interruptible gas with prices and quantities to be renegotiable each month. The Dakar offer required the buyer to construct and maintain pipelines and meters at the wells located approximately 800 to 1,000 miles from Chanute. The Mesa proposal, which called for a price of $2.85/mcf, plus a transportation charge of $.52/mcf, was not acceptable to the Cities because it was "not competitive with Vesta." Finally, both Tenneco Oil Exploration & Production Company and Mobil Oil Corporation have entered into the Order No. 451 GFN process with WNG, but the process is not yet complete. Accordingly, the terms at which that gas will be offered to the Cities are not yet known.

Order No. 500

In response to the remand of Order No. 436 by the Court of Appeals in *Associated Gas Distributors*, the Commission issued Order No. 500 on August 7, 1987. Order No. 500 basically provides a crediting mechanism whereby pipelines which transport gas for producers under Order No. 436 may receive a credit against their obligations to take a similar volume of gas under take-or-pay contracts with those same producers.

There are, however, some situations in which pipelines must transport gas without credits. The most obvious situation occurs when the pipeline does not have a take-or-pay contract with the producer who owned the gas being transported by the pipeline. In such a case, there could be no credits because there would be no qualifying take-or-pay contract against which to apply any credits.

A second situation in which a pipeline must transport a producer's gas without credits occurs when a pipeline transports gas which it previously purchased under a terminated take-or-pay contract, and which is not presently committed to the pipeline. For instance, if a producer-pipeline contract has been terminated under Order No. 451, no credits would be available to a pipeline which later transported the same producer's gas. However, for a contract to be considered terminated under Order No. 451, sales of all gas covered by that contract must have been abandoned or terminated under No. 451's GFN rule.

Conclusions of Law

Before a preliminary injunction may be granted, four prerequisites must be satisfied by the moving party. The movant must establish: (1) a showing that the movant will suffer irreparable injury unless the injunction issues; (2) proof that the threatened injury outweighs whatever damage the proposed injunction may cause the opposing party; (3) a showing that the injunction, if issued, would not be adverse to the public interest; and (4) a substantial likelihood that the movant will eventually prevail on the merits. *Amoco Oil Co. v. Rainbow Snow, Inc.*, 809 F.2d 656, 661 (10th Cir. 1987); *City of Chanute v. Kansas Gas & Electric Co.*, 754 F.2d 310, 312 (10th Cir. 1985). Where the first three requirements for a preliminary injunction are satisfied, the Tenth Circuit has lessened the moving party's burden of proof on the fourth requirement. The court has held: " '[I]f the other elements are present .... it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful as to make them a fair ground for litigation and thus for more deliberate investigation.'" *Lundgrin v. Claytor*, 619 F.2d 61, 63 (10th Cir. 1980), *(quoting Continental Oil Co. v. Frontier Refining Co.*, 338 F.2d 780, 781-86 [10th Cir. 1964]). The function of a preliminary injunction is to preserve the status quo pending the outcome of the case. *Tri-State Generation v. Shoshone River Power, Inc.*, 805 F.2d 351, 355 (10th Cir. 1986). Thus, as a preliminary matter, the court must consider whether the grant of a preliminary injunction would preserve or upset the status quo.

Williams argues a preliminary injunction could only alter the status quo because Williams' pipeline is currently closed to transportation of third party gas and the plaintiffs seek to open the pipeline. The Cities point out, however, that Williams' pipeline was open until August 1,1987, and the Cities, by filing the instant action, were only attempting to preserve the status quo as it existed prior to August 1, 1987. The court finds the Cities' argument persuasive, particularly in light of the fact the Cities filed this action on August 3, 1987, only two days after WNG had ceased open access.

Irreparable Harm

[l] Perhaps the most important prerequisite for the issuance of a preliminary injunction is a showing that if the injunction is not granted, the movant will suffer "irreparable harm" before a decision on the merits can be rendered. 11 Wright & Miller, *Federal Practice and Procedure: Civil* § 2948. A preliminary injunction will usually be denied if monetary damages are sufficient to compensate a plaintiff. *Tri-State Generation v. Shoshone River Power, Inc.*, 805 F.2d at 355; *Holly Sugar v. Goshen County Co-op. Beet Growers*, 725 F.2d 564, 570 (10th Cir. 1984).

The question of whether the Cities have suffered "irreparable injury" must focus on the Cities' long-term contracts with Vesta. The Cities' contentions with respect to this issue are simple and persuasive. When Williams closed its pipeline on August 1, 1987, each of the plaintiff cities had available a dependable, long-term source of gas at a substantially lower cost than the gas supplied by Williams. The Cities argue when Williams closed its pipeline, it effectively terminated the Cities' arrangements for such gas, and this loss constituted "irreparable injury" to the Cities.

Williams contends, however, the loss of the Vesta contracts cannot form the basis for the Cities' claims of "irreparable injury" because (1) three of the plaintiff cities had no long-term contracts in place at the time WNG closed its pipeline; and (2) the Cities' contracts with Vesta were "suspended" rather than "terminated" by WNG's closing of the pipeline.

WNG apparently concedes that the Edison/Vesta contract was for a long-term supply of gas, and that this gas was "earmarked" for the cities of Auburn, Humboldt, Iola and Osage City, Kansas and Cleveland, Oklahoma. WNG focuses instead on the cities of Chanute, Garnett and Neodesha, and argues these cities had no long-term contracts in place on August 1, 1987, and thus could not be irreparably harmed.

However, testimony at hearing showed that these three cities (Chanute, Garnett and Neodesha) were in the process of negotiating long-term contracts directly with Vesta when WNG closed its pipeline. For instance, Vesta's "letter agreements" with these three cities for the sale of "spot gas" in June and July of 1987 specifically noted that Vesta would flow the short-term gas to the Cities while the long-term agreements were being finalized. Moreover, Vesta's representative, David Tudor, testified that Vesta "fully intended to offer and enter into" a long-term gas sales contract with the cities of Chanute, Neodesha and Garnett and the essential terms of the agreement had been finalized (e.g., a five-year contract for the sale of gas at the rate of $1.45/mcf, adjusted according to 70% of WNG's sales service charge). Tudor further stated that the agreement was not actually entered into because it was uncertain how long Williams would keep its pipeline open. Thus, it is clear that had Williams not closed its pipeline, each of the plaintiff Cities would now have a supply of long-term, low price gas available through Vesta.

Williams asserts, however, that even if the court finds that each of the Cities had a long-term source of supply available through Vesta, the Cities cannot show that such contracts were lost as a result of Williams closing its pipeline. WNG notes that the Edison/Vesta contract (which was the source of supply for five of the Cities) contained a "force majeure" provision which arguably "suspended" rather than "terminated" the contract in the event the gas could not be transported over WNG's line. Thus, Williams reasons that should it decide at some indefinite point in the future to open access to its pipeline, the Vesta contract will, in effect, "pick up where it left off." Accordingly, Williams argues the Cities have not suffered irreparable injury because the contracts have not been terminated, and any loss suffered by the Cities will be compensable in money damages.

This argument is not supported by the evidence. First, the contract provision in question provides:

> 14.1 The term "force majeure" as used in this Gas Purchase Contract shall mean Acts of God, strikes, lockouts or other industrial disturbances ... and causes of like or similar kind, whether herein enumerated or not, and not within the control of the party claiming

like or similar kind, whether herein enumerated or not, and not within the control of the party claiming suspension and which by the exercise of due diligence such party is unable to overcome.

14.3 It specifically is recognized and agreed by the parties hereto that the gas to be made available for sale and delivery by Seller which is purchased by Buyer hereunder may be transported by third party pipelines for Seller's account in order to effect delivery to Buyer at the delivery point(s). Accordingly, in addition to such other events of *force majeure* also shall exist when any third party pipeline is unable or otherwise declines to transport any volume of gas subject hereto during any period of time.

(Pltfs' Ex. 13, pp. 11-12.)

While it is clear that a pipeline's refusal to transport gas is a "force majeure" event under the contract, it is not clear from the contract the effect such an event has upon the parties' obligations to perform. It is probable that a determination of this question would require an examination of the entire contract and the intent of the parties as well as a consideration of the indefinite duration of the "force majeure" event in this instance. In any event, that question is not before this court. What is properly before the court is the testimony of Vesta's vice president, David Tudor, who stated that when WNG closed its pipeline, the gas which would have been sold to the plaintiff cities was resold on the spot market and transported over an open-access pipeline. Moreover, Tudor testified that if Williams' pipeline were to open again six months to a year after this case is tried on the merits, Vesta might not be willing to enter into a long-term gas purchase agreement with the plaintiff cities.

Tudor's testimony supports two findings: (1) the Cities' contracts with Vesta were effectively terminated when WNG closed its pipeline; and (2) if an injunction is not granted in this case, the Cities may lose the opportunity to contract with Vesta for a long-term, dependable supply of low cost gas.

This determination raises a final question with respect to this issue, e.g., can the loss of the Vesta contracts constitute "irreparable injury"?

A similar situation was addressed by the Tenth Circuit Court of Appeals in *City of Chanute v. Kansas Gas & Electric Co.*, 754 F.2d 310, and a brief discussion of that case is helpful here.

In *City of Chanute*, the plaintiffs were three cities which generated electric power through their own operation and distribution systems, and also purchased wholesale electric power from defendant Kansas Gas and Electric Company (KG & E). A dispute arose between the parties when the plaintiff cities attempted to contract with additional suppliers of electricity [4] and thus approached KG & E (which maintained the only transmission lines into the plaintiff cities) to arrange for the "wheeling" (or transfer) of the power. While KG & E was willing to wheel power to the cities, it would do so only on the condition that the cities would enter into new, higher priced contracts with KG & E for the purchase of wholesale power. When the cities refused to accept these conditions, KG & E refused to wheel power to them. 754 F.2d at 311-12. Plaintiffs subsequently filed an action against KG & E alleging violations of §§ 1 and 2 of the Sherman Act and of § 3 of the Clayton Act.

The trial court granted plaintiffs' motion for a preliminary injunction requiring KG & E to wheel power to the cities pending the outcome of the suit, and in so doing found that all three cities would suffer irreparable harm if the injunction were not granted. *City of Chanute v. Kansas Gas and Elec. Co.*, 564 F.Supp. 1416 (D.Kan. 1983).

---

4 The Cities of Chanute and Iola contracted with the Southwestern Power Administration (SWPA) and were to begin receiving five-year allocations of federally generated hydro-electric power on January 1, 1984. The City of Fredonia contracted with the Kansas Municipal Energy Agency to begin receiving power from the Nearman Creek Generating Plant on June 1, 1983, and was liable for demand charges whether or not the energy was transmitted. 564 F.Supp. at 1418.

On appeal, the Tenth Circuit affirmed the district court's finding of irreparable harm as to the Cities of Chanute and Iola, but reversed that finding as to the City of Fredonia. The appeals court determined that because Chanute and Iola would lose their allotment of power without wheeling, they suffered irreparable damages. The court reasoned:

> The difference in energy cost incurred by Chanute and Iola with and without SWPA power may be ascertainable, at least for the immediate future. *The value of the availability of potential supplier, however, cannot always be measured in dollars, particularly when, as here, such availability changes the competitive structure of the market and the supplier may be necessary to meet the long-term electrical demands of the cities.*

754 F.2d at 313 (emphasis added).

However, the court in *City of Chanute* distinguished Fredonia's situation on the ground that Fredonia's right to power from the Nearman Creek Project was not contingent on the issuance of the injunction. Rather, the court held that absent the injunction, the city "would merely be forced to pay for power it did not receive. This injury can be measured and compensated in dollars." 754 F.2d at 313.

The position of the plaintiff Cities in the instant case can be likened to that of Chanute and Iola in *City of Chanute*. For instance, unless an injunction is issued here, the Cities stand to lose a potential supplier of low-cost, long-term gas—a supply which may be necessary to meet the Cities' long-term gas needs. Moreover, it is difficult to estimate the effect of the loss of such gas on the Cities' customers — whether residential, commercial or industrial.

Williams contends that even if the Cities were to lose the Vesta supply of gas, the Cities would not be irreparably harmed because there are alternative supplies of gas available to the Cities at comparable or perhaps even better prices.

First, WNG cites the availability of 451 gas as an "alternative" source of gas to the Cities. WNG asserts that "enough gas will be

available to the Cities through the Order 451 GFN process to satisfy the Cities' combined peak day requirements 10 times over." (Def.'s Brief, p. 42.) Defendant's argument is misplaced. Plaintiffs have never suggested that there is not enough gas available to satisfy their needs. Rather, the issue is whether the Cities have been irreparably harmed by their inability to purchase low-cost, long-term gas from a dependable third party supplier and to have that gas transported over Williams' pipeline.

While it is true that if the Cities were to purchase 451 gas WNG would be required to transport the gas over its line, it is also true that the Cities have not yet received any offers for 451 gas comparable to the supply they can obtain from Vesta. Further, Order 451 provides that the producer need only offer the released gas to a pipeline's customers *after* the pipeline's offer has been rejected, and *after* an offer from a third party has been obtained. Therefore, it seems unlikely that the Cities will be able to obtain 451 gas comparable in price and term to that obtained through Vesta. In any event, as stated earlier, the 451 gas which has been offered to the Cities to date has been unacceptable either because of price or term or other conditions attached to the offer.

Defendant also suggests that in addition to the availability of 451 gas, the Cities have available substantial volumes of "local gas". [5] Defendant points out that the City of Chanute currently has a contract to purchase local gas from Chooch, Inc. and a pipeline from Chooch's wells to the City is nearly complete. Additionally, the City of Neodesha is currently connected to the local gas supply of Willis Gas Company and has purchased some gas from Willis in the past.

The evidence showed, however, that the Chooch contract covered only a small percentage of Chanute's total requirements and was not

---

5 WNG's full requirements contracts with the Cities contain an exception which permits the Cities to purchase "local gas" from a third party without violating their full requirements contracts. While "local gas" may be defined in various ways, when used in this case it refers to gas reserves located in geographic proximity to the plaintiff Cities.

contemplated to save the City's long-term needs. Moreover, the City of Neodesha is no longer purchasing gas from Willis because of quality problems experienced with Willis' gas in the past.

The evidence simply does not show that local gas of sufficient quality, price and volume is available to satisfy the needs of the Cities on a long-term basis. Further, even if the local gas did meet all of the necessary criteria, since Williams' pipeline is closed, the Cities in most instances would be required to construct pipelines from the gas reserves to the Cities. This is neither a feasible nor reasonable alternative.

The court therefore holds that the Cities have sufficiently shown that they will suffer irreparable injury unless the injunction issues.

Balance of Harms

[2] Plaintiffs must next show that the threatened injury to plaintiffs outweighs whatever damage the proposed injunction may cause defendant. This element presents a difficult question, as both the Cities and WNG argue they will suffer injury if the court were to impose an injunction. However, for the reasons detailed below, the court finds the balance of hardships must weigh in favor of the Cities in this case.

The Cities point to the loss of an inexpensive, long-term gas supply, higher prices to customers and the potential loss of businesses and sales as evidence that the injury to the Cities, if the injunction is not granted, would outweigh any injury to the defendant if the injunction is granted. WNG maintains, however, the balance of harms must lie in its favor because of the substantial take-or-pay exposure it would allegedly incur if the injunction is granted. WNG, relying on § 4(b) of the NGA, reasons that if the court orders WNG to open access to its pipeline to the plaintiff cities, Williams would subsequently be forced to open access to its pipeline on a system-wide basis.

Section 4(b) of the NGA provides:

> (b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (l) make or grant any

> *undue* preference or advantage to any person or subject any person to any *undue* prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

15 U.S.C. § 717c(b) (emphasis added).

Based on this statute, Williams argues FERC would not permit WNG to provide transportation service to the Cities alone, but instead would require that any service offered to the Cities be offered to all WNG customers on a nondiscriminatory basis. Further, Williams estimates that under system-wide open access, transportation service would substantially displace gas sales and the company would be subject to take-or-pay exposure in the amount of $90 million to $140 million. WNG reasons that the injury to WNG in the form of take-or-pay exposure would outweigh the "small benefit" of reduced gas rates to the Cities.

Noting that § 4(b) of the NGA prohibits only "undue" or "unreasonable" differences, the Cities argue that a difference in the treatment or services provided to WNG's customers would not by itself violate the NGA. *See Michigan Consol Gas Co. v. Federal Power Commission,* 203 F.2d 895, 901 (3d Cir. 1953). Further, the Cities correctly point out that this court has not been asked to open access to WNG's entire pipeline. Rather, the issue currently before this court is whether Williams maintains an intentional monopoly in the eight cities which are parties to this action, and whether the Cities are entitled to a preliminary injunction ordering WNG to open its pipeline to those cities.

Accordingly, the court concludes that an injunction ordering Williams to open its pipeline to the plaintiff Cities would result in only minimal take-or-pay exposure to the defendant, while a denial of the requested injunction may result in the loss to the Cities of a steady, assured supply of natural gas at a price far more reasonable than that presently assessed by Williams.

Public Interest

[3] The issue of whether the injunction, if issued, would adversely affect the public interest requires an examination of the effect of an injunction on the customers of the Cities as well as the effect of an injunction on WNG's customers.

There can be no doubt that substantially lower wholesale gas prices would benefit, rather than adversely affect, the customers of the plaintiff Cities, as the Cities would pass the cost savings on to their retail customers.

WNG once again suggests that it will be exposed to substantial take-or-pay liability if the court grants the requested injunction, and it is likely that at least part of these costs will ultimately be passed on to all of WNG's customers, thereby adversely affecting the public interest.

As already discussed, such an argument improperly clouds the issue in this case. This court has not been asked to order open access to Williams' entire pipeline—or to, in effect, force Williams' compliance with Order No. 436. Rather, this court is here concerned only with whether WNG has an intentional monopoly in the eight plaintiff cities in violation of § 2 of the Sherman Act. Moreover, as this court commented in its ruling from the bench on this motion, it cannot be in the public interest for anyone to be forced to accept WNG gas at its present rate, knowing full well that such rate is not competitive in a real world setting.

Accordingly, the court finds the grant of the requested injunction would not adversely affect the public interest.

The final element plaintiffs must show is that they can demonstrate a likelihood of success on the merits.

As earlier stated, where the first three requirements are met, the moving party's burden of proof on the fourth requirement is lessened. Accordingly, plaintiffs will satisfy the fourth requirement if they raise questions going to the merits "so serious, substantial, difficult and doubtful" as to make them a fair ground for litigation and thus for more deliberate investigation.

[4] In order to prevail on the merits, plaintiffs must prove the defendant has violated § 2 of the Sherman Act. The offense of monopolization under § 2 of the Sherman Act has two elements:

(1) The possession of monopoly power in the relevant market; and

(2) The willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S.Ct. 1698, 1703-04, 16 L.Ed.2d 778 (1966); *see also, Bright v. Moss Ambulance Service*, 824 F.2d 819, 823 (10th Cir. 1987); *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1519 (10th Cir. 1984), *aff'd*, 472 U.S. 585, 105 S.Ct. 2847, 86 L.Ed.2d 467 (1985). The Tenth Circuit has defined monopoly power as the ability to control prices and exclude competition. While the two elements are closely related, both must be demonstrated to establish the existence of monopoly power. *Bright v. Moss Ambulance Service, Inc.*, 824 F.2d at 824 (*citing Shoppin Bag of Pueblo, Inc. v. Dillon Companies, Inc.*, 783 F.2d 159, 164 [10th Cir. 1986]).

[5, 6] Plaintiffs seek to prove liability under § 2 by utilizing the "essential facilities" or "bottleneck" doctrine. Under this doctrine, a business or group of businesses which control a scarce facility has an obligation to give competitors reasonable access to it. *Byars v. Bluff City News Co., Inc.*, 609 F.2d 843, 856 (6th Cir. 1979). The bottleneck theory differs from traditional monopolization analysis in that the intent factor is de-emphasized and emphasis is placed instead on the surrounding market conditions. Kintner, Federal Antitrust Law § 10.25 n. 484 (1980). Further, the doctrine is particularly applicable to natural gas pipelines and their refusal to transport third party gas. McNulty, *Freeing the Captives: Nondiscriminatory Access to Transportation in the Interstate Gas Market*, 47 U.Pitt.L.Rev. 843 (Spring 1986).

The Tenth Circuit Court of Appeals recently discussed and applied the doctrine in *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509. The court there defined the four elements necessary to establish liability under the essential facilities doctrine as follows:

(l) Control of the essential facility by a monopolist;

(2) A competitor's inability to duplicate the facility;

(3) Denial of the use of the facility to a competitor; and

(4) The feasibility of providing the facility.

738 F.2d at 1520 *(quoting MCI Communications v. A T & T,* 708 F.2d 1081, 1132-33 (7th Cir.), *cert. denied*, 464 U.S. 891, 104 S.Ct. 234, 78 L.Ed.2d 226 (1983)).

Prior to discussing the application of each of the above elements, a preliminary issue must first be addressed. Specifically, plaintiffs contend that when the "essential facilities" doctrine is utilized proof of its elements is proof of monopoly power, and plaintiffs need not show "the relevant market". Defendant on the other hand, argues proof of the relevant market is always a threshold element in determining whether there has been a violation of § 2 of the Sherman Act.

In support of its contention, defendant cites *Consul Ltd v. Transco Energy Co.*, 805 F.2d 490 (4th Cir. 1986). In *Consul*, as in the instant case, plaintiff urged the court to find that under the "essential facilities" doctrine, the court need not concern itself with market definition. The Fourth Circuit Court of Appeals, after reviewing a number of "essential facility" cases, ruled that the relevant market must be proven regardless of the type of § 2 claim utilized by plaintiff. 805 F.2d at 494.

Conversely, plaintiffs contend market analysis is not an indispensable means of proving monopoly power. Plaintiffs cite *Woods*

Exploration & Producing Co. v. Aluminum Company of America, 438 F.2d 1286 (5th Cir. 1971), in support of their contention. In *Woods*, owners of wells in the Appling Field in Texas filed an antitrust action against other producers, contending the defendants possessed monopoly power over the extraction of gas from the Appling Field, and that the relevant area of competition was the field. The court held:

> "When one must look for a monopoly, determining a relevant market in which to look and in which to evaluate competitive effects is obviously an essential first step. But when, with an illegal practice such as is present here in mind, one can look at an area and see the existence of monopoly power, not by inference from market share, but by determining actual ability to exclude competition and control prices, there appears no real need to go further."

438 F.2d 1306 *(quoting Denver Petroleum Corp. v. Shell Oil Co.*, 306 F.Supp. 289 [D.Colo. 1969]).

The *Woods* court, however, then went on to find that the Appling Field was the relevant market and to determine that the defendant possessed monopoly power in that field. Hence, the *Woods* case does not stand for the proposition advanced by plaintiffs here.

[7] The court thus holds the existence or absence of monopoly power cannot be determined in a vacuum but rather must be measured within a defined market. 3 Von Kalinowski, Antitrust Laws and Trade Regulation § 8.02[2] (1986). While it is certainly true that under the "essential facilities" doctrine, analysis of the relevant market may not take on the same implications as it does in other cases, this court concurs with the *Consul* court's determination that the "relevant market" must be proven in every case.

[8] Determining the relevant market typically requires an inquiry into the nature of the product and the geographical area of effective competition. The relevant product market is generally defined to be that area of goods or services in which the product or products offered by the defendant effectively compete while the relevant geographic market is generally defined to be the geographic area of

effective competition in which the product or services is traded. *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 388, 76 S.Ct. 994, 1003, 100 L.Ed. 1264 (1956).

With that stated, the court finds the relevant product market in this case is natural gas. It has not been shown that there is an adequate substitute for natural gas that would be acceptable to the large majority of industrial, commercial, or residential consumers of the Cities. Nor has it been shown that sufficient interchangeability exists between gas and other sources of energy. As for the relevant geographic area, it is clear to the court that while Williams Natural Gas Company operates in a several state geographic area, the plaintiff Cities can practicably turn to supplies only through Williams. Thus, the court concludes the relevant geographic market in this case is the area encompassing the plaintiff Cities.

With this determination of the relevant market in mind, the court now moves on to a consideration of whether this case satisfies the elements of the "essential facilities" doctrine.

The first element, control of the essential facility by a monopolist, has been met here. WNG owns the only natural gas pipeline connected to the plaintiff Cities and also maintains complete control over that pipeline. If WNG refuses to transport third party gas to the Cities, the Cities simply cannot compete for or obtain such gas.

The second element requires a showing of the competitor's inability to duplicate the essential facility. This element must be broken down into two questions for purposes of the court's analysis: (l) do the Cities compete with WNG; and (2) can the Cities duplicate the essential facility?

[9] The essential facility doctrine is applicable only where the firm which controls the essential facility refuses to allow access to the facility to a competitor. *Olympia Equip. Leasing v. Western Union Telegraph*, 797 F.2d 370, 376-77 (7th Cir. 1986); *MCI Communications v. AT & T*, 708 F.2d at 1147 n. 100. Thus, Williams reasons that the Cities in this case are "customers" rather than "competitors" of WNG and cannot utilize the essential facility doctrine.

The Cities do not attempt to argue that competition exists between Williams and the Cities for retail customers. Rather, the Cities point out that Williams directly serves a number of industrial customers within and around the Cities —- customers the Cities could potentially serve if the Cities could obtain lower priced gas.

WNG counters that direct sales to end users comprise only about 16% of its total sales. Further, WNG's president and vice president testified at the hearing that WNG has always viewed the Cities as customers rather than competitors.

Regardless of how small a percentage of WNG's business consists of direct sales, and regardless of how WNG views the plaintiff Cities, the court finds the Cities do compete to some degree with WNG for direct sale customers. Moreover, there is no question that by denying access to its pipeline to Vesta and other potential suppliers, WNG has foreclosed competition and prevented the plaintiff Cities from obtaining competitively priced gas. Thus, the court finds plaintiffs are entitled to utilize the essential facility doctrine.

[10] Plaintiffs must next show that they are unable to "duplicate" the essential facility. This element does not require plaintiff to show that it would be impossible to duplicate the facility or that the facility is indispensable. Rather, it is sufficient if duplication of the facility would be economically infeasible, and if denial of its use would inflict a severe handicap on potential market entrants. *Fishman v. Estate of Wirtz*, 807 F.2d 520, 539-40 (7th Cir. 1986); *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992 (D.C.Cir. 1977), *cert. denied*, 436 U.S. 956, 98 S.Ct. 3069, 57 L.Ed.2d 1121 (1978); *Consolidated Gas Company of Florida, Inc. v. City Gas Company of Florida*, 665 F.Supp. 1493, 1534 (S.D.Fla. 1987).

While conflicting evidence was presented at hearing regarding the cost to the Cities of constructing a four-inch pipeline (estimates range from $10,000/mile to $50,000/mile), the court finds that constructing such a pipeline is neither feasible nor required.

Defendant additionally suggests that the fact that two cities are currently connected to local gas supplies is evidence that the Cities are able to duplicate defendant's facility.

In *MCI Communications v. AT& T,* 708 F.2d at 1147, the court, faced with an analogous situation, held that the fact that MCI was building its own facilities in at least one area was not evidence that it could duplicate AT & T's local service facilities at every point. Similarly, in this case the evidence does not show that each of the plaintiff Cities is capable of constructing a pipeline to local gas supplies. More importantly, the evidence does not show that even if such pipelines were built that local gas supplies would be of the same quality, dependability or price as could be obtained through access to Williams' pipeline. The court therefore finds that plaintiffs are unable to duplicate the essential facility.

Thirdly, the Cities must show denial of use of the facility to a competitor.

[11] WNG argues it has not denied use of the pipeline to the Cities because it continues to supply gas to them through its pipeline, and further, because WNG is required to transport 451 gas to the Cities if they should contract for such gas with the producer. As previously discussed, 451 gas has not been shown to be available to the Cities on a long-term, low-cost basis. Moreover, while WNG continues to provide the Cities with its own gas, it has denied the Cities the opportunity to use the facility to purchase third party gas. Accordingly, the court finds the third element has also been met.

[12] Finally, the Cities must show it is feasible for WNG to provide its facility to the plaintiffs.

WNG has contended throughout these proceedings that it cannot feasibly open access to its pipeline because to do so would result in substantially reduced sales and increased take-or-pay exposure.

First, the court has already determined that if it were to order open access only to the eight plaintiff Cities, minimal or no take-or-pay exposure would be incurred by defendant. Further, WNG would continue

to receive a transportation fee in exchange for transporting third party gas to the Cities.

Secondly, even if take-or-pay exposure was incurred by the defendant as a result of this court's order, the "justification of self-preservation" has not been successfully asserted as a defense to denial of access to an essential facility. *Consolidated Gas Company of Florida v. City Gas Company of Florida,* 665 F.Supp. at 1536. A similar argument to that made by the defendant here was made in *Otter Tail Power Co. v. United States,* 410 U.S. 366, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973). In *Otter Tail,* an electric power company was held to have violated § 2 of the Sherman Act by monopolizing and attempting to monopolize the retail distribution of electric power in its service area by attempting to prevent communities in which its retail distribution franchise had expired from replacing it with a municipal distribution system. The power company argued that if it did not prevent the establishment of municipal electric systems, more and more municipalities would turn to public power and the company would go downhill. The Supreme Court held:

> The argument is a familiar one. It was made in *United States v. Arnold, Schwinn & Co.,* 388 U.S. 365,18 L Ed 2d 1249, 87 S Ct 1856, a civil suit under § 1 of the Sherman Act dealing with a restrictive distribution program and practices of a bicycle manufacturer. We said: "The promotion of self-interest alone does not invoke the rule of reason to immunize otherwise illegal conduct." Id., at 375, 18 L Ed 2d 1249 [87 S.Ct. at 1863].
>
> The same may properly be said of § 2 cases under the Sherman Act. That Act assumes that an enterprise will protect itself against loss by operating with superior service, lower costs, and improved efficiency. Otter Tail's theory collides with the Sherman Act as it sought to substitute for competition anticompetitive uses of its dominant economic power.

410 U.S. at 380, 93 S.Ct. at 1031 (footnote omitted).

Accordingly, the court finds the defendant cannot rely on the threat of take-or-pay exposure as a defense to the Cities' antitrust claim. The Cities have shown it is feasible for WNG to provide its facility to plaintiffs.

Plaintiffs have thus established the likelihood they will prevail on their "essential facility" claim and have raised questions going to the merits "so serious, substantial, difficult and doubtful as to make them a fair ground for litigation." With this determination made, plaintiffs have satisfied each of the requirements necessary to obtain a preliminary injunction.

IT IS ACCORDINGLY ORDERED this 5th day of February, 1988, that plaintiffs' motion for preliminary injunction is granted. Defendant is ordered to open access to its pipeline to the eight plaintiff Cities for the transport of third party gas. The Cities are thus advised to formalize their respective contracts for the purchase of gas from Vesta. Once such contracts are in place, the Cities will have waived their present contracts with Williams and any rights or claims that may exist under those contracts.

A status conference is scheduled in chambers on February 26, 1988, at 1:00 P.M.

MEMORANDUM ORDER

On Motion to Modify

Defendant Williams Natural Gas Company ("WNG") has filed a motion to modify in two respects the preliminary injunction entered herein on February 5, 1988. The court has reviewed Williams' brief with attachments, being an emergency application for temporary and permanent certifications of public convenience and necessity by the Federal Energy Regulatory Commission ("FERC"). Ironically, WNG seemingly represents to FERC that it intends to appeal this court's order of February 5,1988, and seek a stay of its implementation before the Tenth Circuit Court of Appeals.

Notwithstanding, Williams seeks recasting of this court's order to enable the parties to perform certain predicate acts as follows:

> A. Direct each plaintiff electing to receive relief under the injunction to furnish WNG by a date certain with the data, documents and information required by law (18 C.F.R. § 157.5 *et seq.*) for a complete filing with the Federal Energy Regulatory Commission ("FERC") seeking regulatory authority to transport third-party natural gas in interstate commerce pursuant to § 7(c) of the Natural Gas Act ("NGA"), 15 U.S. C. § § 717f(c), and corresponding abandonment of existing sales service under § 7(b) of the NGA, 15 U.S.C. § 717f(b);
>
> B. Permit WNG a reasonable time (at least until the status conference set for February 26, 1988) within which (a) to supplement and complete the NGA § 7 application, (b) to complete and deliver the appropriate transportation agreements to the electing plaintiffs for execution; and (c) to receive from the electing plaintiffs the completed documentation and required data in order for WNG to file the same promptly with the FERC as a supplement to the NGA § 7 application; and
>
> C. Grant WNG and the electing plaintiffs a reasonable time to obtain from the FERC emergency approval of the NGA § 7 application, during which period the injunction shall be suspended until the FERC acts so long as the parties diligently pursue the matters set forth above.

In the court's view, the referred requisites are those contemplated and implied by the findings and directive in the February 5, 1988 order. However, the effect of the court's directive and its implementation need not be stayed in the process.

Next, WNG seeks limitation of the transport and distribution of third party gas to the cities, asserting that the order should only apply to

direct sale industrial customers now served by WNG or potential customers served by the Cities, and no other.

In this regard, given the findings, it is this Court's intention that the Cities are at liberty to timely contract for third party gas to be transported by WNG in sufficient quantums to serve all of the Cities' present customers, i.e., industrial, commercial and/or residential.

IT IS ACCORDINGLY ORDERED this 9 day of February, 1988, that defendant Williams Natural Gas Company's motion to modify preliminary injunction is overruled.

FILED
FEB 3 1995

No. 94-1185

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

CITY OF CHANUTE, KANSAS, *et al.*,
Petitioners,

v.

WILLIAMS NATURAL GAS COMPANY,
Respondent.

On Petiton for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF IN OPPOSTION

DONALD W. BOSTWICK
TERESA JAMES
ADAMS, JONES, ROBINSON & MALONE, Chartered
600 Market Centre
155 North Market
P.O. Box 1034
Wichita, Kansas 67201
(316) 265-8591

JOHN T. SCHMIDT *
C. KEVIN MORRISON
CONNER & WINTERS
2400 First National Tower
15 East Fifth Street
Tulsa, Oklahoma 74103
(918) 586-5711

Attorneys for Respondent

DAVID J. BATOW
WILLIAM J. SEARS
THE WILLIAMS COMPANIES, INC.
One Williams Center
P.O. Box 3288
Tulsa, Oklahoma 74101
(918) 588-4229

**Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. 1-800-347-8208

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether this Court should deny its discretionary certiorari review when the decisions below relied extensively on the finding of fact by the District Court that the natural gas transportation service Petitioners receive from Respondent is not the result of this litigation, which finding cannot be set aside unless clearly erroneous.

2. Whether the Petitioners could be considered "substantially prevailing parties" after a final judgment finding their antitrust claims to have been meritless from the outset, and when they obtained no relief from a preliminary injunction improvidently granted.

LIST OF PARTIES AND RULE 29.1 LISTING

There were no parties to this action below other than those identified in the caption of this Brief. Respondent Williams Natural Gas Company is a wholly-owned subsidiary of The Williams Companies, Inc. Other subsidiaries of The Williams Companies, Inc. which are not wholly-owned by that corporation are as follows:

Apco Argentina, Inc.
Kern River Gas Supply Corporation
Kern River Service Corporation
Texasgulf, Inc.
Northern Border Partners, L.P.
Northern Border Intermediate Limited Partnership

In addition, The Williams Companies, Inc. recently acquired a majority of the shares of Transco Energy Company pursuant to a tender offer, but that company has not yet been merged into The Williams Companies, Inc. The subsidiaries of Transco Energy Company which are not wholly-owned by that corporation are as follows:

Border Gas, Inc.
NESP Supply Corporation
Trans-Jeff Chemical Corporation
Tubexpress, Inc.
Enfuels Corporation
FST Holdings, Inc.
Fleetstar of Texas, L.C.
TRANSTAR Technologies, L.C.

TABLE OF CONTENTS

QUESTIONS PRESENTED . . . . . (i)
RULE 29.1 LISTING . . . . . (ii)
TABLE OF AUTHORITIES . . . . . (iv)
OPINIONS BELOW 1
JURISDICTION 2
STATEMENT OF THE CASE 3
REASONS FOR DENYING THE WRIT 8

I. THE COURT OF APPEALS' DECISION IS COMPLETELY IN ACCORDANCE WITH THE LAW AND DOES NOT CONFLICT WITH A PRIOR DECISION OF ANY COURT 9

II. THE CITIES DID NOT ESTABLISH THAT THEY ARE ENTITLED TO AN AWARD OF ATTORNEY'S FEES 15

A. The District Court's Decision Was Based Entirely On A Finding Of Fact Subject To A Clearly Erroneous Standard Of Review 17

B. The District Court's Finding That The Transportation Service The Cities Receive Is Not The Result Of This Litigation Is Not Clearly Erroneous . . . 18

C. The Cities' Antitrust Claims Were Without Merit From The Outset 21

CONCLUSION 23

TABLE OF AUTHORITIES

CASES: United States Supreme Court

Berenyi v. District Director, INS, 385 U.S. 630 (1967) 17
Branti v. Finkel, 445 U.S. 507 (1980) 17
Farrar v. Hobby, 506 U.S. ___, 113 S.Ct. 566 (1992) 12, 13, 16
Goodman v. Lukens Steel Co., 482 U.S. 656 (1987) . . . 17
Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989) 18
Hensley v. Eckerhart, 461 U.S. 424 (1983) 15
Hewitt v. Helms, 482 U.S. 755 (1987) 13
NCAA v. Board of Regents of the University of Oklahoma, 468 U.S. 85 (1984) 17
Rhodes v. Stewart, 488 U.S. 1 (1988) 13
Rogers v. Lodge, 458 U.S. 613 (1982) 17
Texas State Teachers Ass'n v. Garland Indep. School Dist., 489 U.S. 782 (1989) 15
United States v. Doe, 465 U.S. 605 (1984) 17
United States v. New York Tel. Co., 434 U.S. 159 (1977) 18
Whitley v. Albers, 475 U.S. 312 (1986) 18

CASES: United States Courts of Appeals

City of Chanute v. Williams Natural Gas Co., 31 F.3d 1041 (10th Cir. 1994) 2, 4, 21

City of Chanute v. Williams Natural Gas Co., 955 F.2d 641 (10th Cir.), *cert. denied*, ___ U.S. ___ (1992) 3, 7
City of Malden v. Union Elec. Co., 887 F.2d 157 (8th Cir. 1989) 9, 10, 22
Dahlem v. Board of Education, 901 F.2d 1508 (10th Cir. 1990) 14
Foremaster v. City of St. George, 882 F.2d 1485 (10th Cir. 1989), *cert. denied*, 495 U.S. 910 (1990) 15
Kansas Health Care Ass'n, Inc. v. Kansas Dep't of Social & Rehabilitation Services, 31 F.3d 1052 (10th Cir. 1994) 22
Lundgrin v. Claytor, 619 F.2d 61 (10th Cir. 1980) 12
Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978) . . . 15
Royal Crown Cola Co. v. Coca-Cola Co., 887 F.2d 1480 (11th Cir. 1989), *cert. denied*, 497 U.S. 1011 (1990) 18
Southwest Marine, Inc. v. Campbell Indus., 732 F.2d 744 (9th Cir.), *cert. denied sub nom, Triple "A" Machine Shop, Inc. v. Southwest Marine, Inc.*, 469 U.S. 1072 (1984) 11
Southwest Marine, Inc. v. Campbell Indus., 796 F.2d 291 (9th Cir. 1986), *opinion amended*, 806 F.2d 898 (9th Cir. 1986), *reh'g denied*, 811 F.2d 501, 503 (9th Cir.), *cert. denied sub nom., Triple A Mach. Shop, Inc. v. Southwest Marine, Inc.*, 484 U.S. 895 (1987) 9, 22, 23
Southwest Marine, Inc. v. Campbell Indus., 806 F.2d 898 (9th Cir. 1986) 12
Southwest Marine, Inc. v. Campbell Indus., 811 F.2d 501 (9th Cir.), *cert. denied sub nom, Triple A*

Mach. Shop, Inc. v. Southwest Marine, Inc., 484 U.S. 895 (1987) 12
Supre v. Ricketts, 792 F.2d 958 (10th Cir. 1986) 22
United Handicapped Fed'n v. Andre, 622 F.2d 342 (8th Cir. 1980) 10

CASES: United States District Courts

City of Chanute v. Williams Natural Gas Co., 678 F. Supp. 1517 (D. Kan. 1988) 3
City of Chanute v. Williams Natural Gas Co., 743 F. Supp. 1437 (D. Kan. 1990), *aff'd*, 955 F.2d 641 (10th Cir.), *cert. denied*, ___ U.S. ___ (1992) 3, 6, 7
City of Chanute v. Williams Natural Gas Co., 820 F. Supp. 1290 (D. Kan. 1993), *aff'd*, 31 F.3d 1041 (10th Cir. 1994) 2-8, 17, 20
City of Chanute v. Williams Natural Gas Co., 1990-1 Trade Cas. ¶ 68,967 (D. Kan. 1990), *aff'd*, 955 F.2d 641 (10th Cir.), *cert. denied*, ___ U.S. ___ (1992) 3, 7
F. & M. Schaefer Corp. v. C. Schmidt & Sons, Inc., 476 F. Supp. 203 (S.D.N.Y. 1979) 16
Harnischfeger Corp. v. PACCAR, Inc., 503 F. Supp. 102 (E.D. Wis. 1980) 16
Southwest Marine, Inc. v. Campbell Indus., 796 F. Supp. 291 (S.D. Cal. 1985), *aff'd*, 796 F.2d 291 (9th Cir. 1986), *cert. denied sub nom. Triple A Mach. Shop, Inc. v. Southwest Marine, Inc.*, 484 U.S. 895 (1987) 11

State of Illinois ex rel. Hartigan v. Panhandle Eastern Pipe Line Co., 730 F. Supp. 826 (C.D. Ill. 1990), *aff'd*, 935 F.2d 1469 (7th Cir. 1991), *cert. denied*, 112 S.Ct. 1169 (1992) 5

Constitutional Provisions, Statutes, and Rules

15 U.S.C. § 717c 4
28 U.S.C. § 2101 2
Clayton Act § 4, 15 U.S.C. § 15 9
Clayton Act § 16, 15 U.S.C. § 26 9
Supreme Court Rule 14 2

Administrative Materials

FERC Order No. 436, 50 Fed. Reg. 42,408 (1985) 5
Williams Natural Gas Co., 48 F.E.R.C. (CCH) ¶ 61,057 (1989) 20

No. 94-1185

IN THE

Supreme Court of the United States

CITY OF CHANUTE, KANSAS, *et al.*,

Petitioners,

v.

WILLIAMS NATURAL GAS COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION

OPINIONS BELOW

The Respondent, Williams Natural Gas Company ("WNG"), respectfully requests that this Court deny the Petition for a Writ of Certiorari seeking review of the decision of the United States Court of Appeals for the Tenth Circuit. That decision affirmed the Memorandum and Order of the United States District Court for the District of Kansas denying the Petitioners' application for attorney's fees. The Petitioners will be referred to herein, as they were by the

Courts below, as "the Cities." The opinions below are published at 31 F.3d 1041 (10th Cir. 1994), and 820 F. Supp. 1290 (D. Kan. 1993).

JURISDICTION

The Petition correctly cites the controlling jurisdictional statutes, but omits the dates of the orders and opinions below which determine whether the Petition for Certiorari was timely filed. The District Court entered its Memorandum and Order denying the Cities' application for attorney's fees on February 18, 1993. The Court of Appeals' opinion affirming the District Court was filed on August 8, 1994, and the Cities' Petition for Rehearing was denied on September 8, 1994. Therefore, the present Petition for Writ of Certiorari was due to be filed on December 7, 1994. 28 U.S.C. § 2101(c).

The Petition served on Respondent, however, was not received until December 12 and did not include an Affidavit of Mailing. Therefore, Respondent does not know whether the Petition was timely filed. Furthermore, the Petition actually filed failed to include a copy of the District Court Memorandum and Order as required by Supreme Court Rule 14.1(k)(ii). The Cities did not file a Supplemental Appendix including the omitted decision until January 5, 1995. Hence, it is unclear whether the Petition was filed in a timely manner such as to properly invoke this Court's Certiorari jurisdiction pursuant to 28 U.S.C. § 2101.

STATEMENT OF THE CASE[1]

This lawsuit has been pending for more than seven years and as noted in footnote 1, has been the subject of six published decisions. Throughout that time, the Cities have not received a single item of relief. The action began on August 3, 1987, two days after WNG suspended its interim open-access transportation program, when the Cities filed their original Complaint alleging the suspension violated the Sherman Act. The Cities also moved for a temporary restraining order ("TRO"), which was denied on August 7, 1987.

On August 18, 1987, the Cities moved for a preliminary injunction requiring WNG to resume the interim open-access program. After ten days of hearings, the District Court granted the Cities' motion by written order filed on February 5, 1988. *Chanute I,* 678 F. Supp. 1517 (D. Kan. 1988). WNG immediately appealed the preliminary

---

[1] As Judge Tacha noted in the Court of Appeals' decision, the historical background of this case has already been set out in several court opinions. *See City of Chanute v. Williams Natural Gas Co.*, 678 F. Supp. 1517 (D. Kan. 1988) ("*Chanute I*"), *City of Chanute v. Williams Natural Gas Co.*, 1990-1 Trade Cas. ¶ 68,967 (D. Kan. 1990) ("*Chanute II*"), and *City of Chanute v. Williams Natural Gas Co.*, 743 F. Supp. 1437 (D. Kan. 1990) ("*Chanute III*"), both *aff'd*, 955 F.2d 641 (10th Cir.) ("*Chanute IV*"), *cert. denied*, ___ U.S. ___ (1992). More particularly, both of the decisions below outlined that history in the context of the standards applicable to the present attorney's fees application. *See City of Chanute v. Williams Natural Gas Co.*, 820 F. Supp. 1290 (D. Kan. 1993) ("*Chanute V*"), *aff'd*, 31 F.3d 1041 (10th Cir.) ("*Chanute VI*"). WNG will only briefly address here the basic events leading up to the Cities' application for attorney's fees since they are important to the fact-based arguments WNG puts forth later.

injunction, and on March 3, 1988, the Court of Appeals stayed the preliminary injunction pending oral argument.[2] *See Chanute V*, 820 F. Supp. at 1290, Sup. App. at 25a. Between February 5, 1988 and the Tenth Circuit's stay, the Cities did not request, nor did WNG provide, any transportation service pursuant to the preliminary injunction. *Chanute V*, 820 F. Supp. at 1292, Sup. App. at 29a.[3]

---

[2] The Cities state in their Petition that this Court stayed the preliminary injunction, Petition at 4, but that simply is not true. This Court's only involvement in this case to date has been to deny the Cities' Petition for a Writ of Certiorari after the judgment in favor of WNG on the merits was affirmed. It was a panel of the Tenth Circuit Court of Appeals which stayed the preliminary injunction before it could go into effect. *See Chanute VI*, 31 F.3d at 1044, App. at 5a. In addition to that error, the reproduction of the Court of Appeals' opinion in the Cities' appendix contains numerous errors. For instance, the Cities' appendix states that the Court of Appeals held that "a party *must* be awarded attorneys' fees where it has received 'at least some relief on the merits of [its] claim' by judicial determination." App. at 13a (emphasis added). In fact, the Court of Appeals said that "a party *may* be awarded attorneys' fees" in that circumstance, a clearly different meaning. 31 F.3d at 1047, App. at 13a (emphasis added). *See also* note 9 *infra*. WNG suggests that the reader would be better served to refer to the reproduction of the opinion in West Publishing's Federal Reporter rather than the Cities' Appendix.

[3] Without citation, the Cities falsely state that "[l]ater WNG dropped [its] claim" that implementing the preliminary injunction could have resulted in as much as $100 million take-or-pay contract exposure to WNG. WNG remains as certain today as it was in 1988 that implementing the preliminary injunction would have required WNG to resume open-access transportation to all its sales customers as a result of the Natural Gas Act's anti-discrimination provision, 15 U.S.C. § 717c(b). Based on its sales customers' elections to cease purchases of gas from WNG during the interim open-access program, WNG knew continuing that transportation program would have made it impossible for WNG to

(continued...)

WNG operates an interstate natural gas company subject to pervasive regulation by the Federal Energy Regulatory Commission ("FERC"). For decades WNG had been principally a merchant of gas, buying it in producing areas and reselling it in its market areas primarily in Kansas and Missouri. More than a year before the Cities filed this lawsuit, WNG had initiated FERC proceedings for an open-access transportation program to achieve the transition envisioned in FERC Order No. 436, 50 Fed. Reg. 42,408 (1985). Order No. 436 began the process of converting the nation's interstate pipelines from their traditional role of being principally a merchant of gas to a combined role of merchant and transporter of gas owned by others. *See Chanute III*, 743 F. Supp. at 1452-53.[4]

WNG filed with FERC a Stipulation and Agreement ("S&A") which WNG had negotiated with its major customers and others in July, 1986 (more than a year before this suit) to establish the open-access program. *See Chanute V*, 820 F. Supp. at 1292, Sup. App. at 29a. Unfortunately, in February, 1987 the FERC substantially modified the S&A by removing much of the protection to WNG from exposure to

---

[3] (...continued)
meet its gas purchase obligations, thereby exposing WNG to many millions of dollars of contract liability.

[4] The court's decision in *State of Illinois ex rel. Hartigan v. Panhandle Eastern Pipe Line Co.*, 730 F. Supp. 826 (C.D. Ill. 1990), *aff'd*, 935 F.2d 1469 (7th Cir. 1991), *cert. denied*, 112 S.Ct. 1169 (1992), contains an exhaustive discussion of the regulatory history and transformation of the natural gas industry brought about by FERC Order No. 436. The District Court relied heavily on that discussion in the summary judgment rulings in this case.

liability under take-or-pay clauses in WNG's own gas purchase contracts, thus making the permanent open-access transportation program financially infeasible. *Id.*

WNG nevertheless continued the regulatory process, attempting to address the FERC's concerns while minimizing WNG's potential for significant take-or-pay exposure. Even while the hearings on the Cities' motion for preliminary injunction were being conducted in the District Court, WNG representatives continued the regulatory process, resulting in a Revised Stipulation and Agreement ("RS&A") filed at FERC nearly a month before the District Court's order of preliminary injunction. *See Chanute III*, 743 F. Supp. at 1456. The RS&A included tariff provisions by which WNG sought authorization to perform the transportation service desired by its customers, including the Cities.

Just prior to the scheduled date for oral argument in the Tenth Circuit on WNG's appeal of the preliminary injunction, FERC approved the RS&A. *See Chanute V*, 820 F. Supp. at 1290-91, Sup. App. at 25a-26a. WNG then filed the new tariffs contemplated by the RS&A, and they too were approved on July 19, 1988, thereby clearing the way for WNG to become a non-discriminatory, open-access transporter under a permanent, FERC-approved program on July 20, 1988. *See Chanute III*, 743 F. Supp. at 1456.

The conversion to open-access transportation permitted WNG to provide the Cities and other customers transportation service for gas they purchased from third parties, thereby rendering moot the preliminary injunction. WNG immediately notified the Court of Appeals by filing a

Suggestion of Mootness, since oral argument on the preliminary injunction appeal was scheduled for July 22, 1988. *See Chanute V*, 820 F. Supp. at 1290, Sup. App. at 25a-26a. At oral argument in that Court, the panel requested the parties to attempt to reach agreement on whether the preliminary injunction had become moot. Failing such an agreement, the panel informed the parties that the case would be remanded to the District Court for a determination of the question. *Id.* That day, WNG and the Cities signed and filed the Stipulation which the Cities now constantly refer to as a "settlement." *Id.* In fact, the Stipulation is nothing more than the parties' agreement that the preliminary injunction motion and its appeal could be dismissed.

After dismissal of the preliminary injunction the case returned to the District Court for decision on the merits, and after more than a year of discovery, WNG filed a series of motions for summary judgment. The District Court granted those motions in *Chanute II* and *Chanute III*. Together, those two Orders dismissed all of the Cities' claims, and the Court entered judgment in WNG's favor on July 30, 1990. The Court of Appeals affirmed in *Chanute IV*, and this Court denied the Cities' Petition for a Writ of Certiorari on October 5, 1992, 113 S.Ct. 96, making the judgment final.

Hence, for all their effort and expense, the Cities ultimately received nothing; all their claims were dismissed and the preliminary injunction they did obtain was never implemented. In the face of that wasteful litigation failure, the Cities now ask for an award of attorney's fees in excess of $800,000. The District Court found, as a matter of fact, that "the Cities did not substantially prevail and are not

entitled to attorneys' fees," *Chanute V*, 820 F. Supp. at 1293, Sup. App. at 30a, and the Court of Appeals affirmed. This Court should not further the wastefulness of this litigation by taking its valuable time and resources to review those decisions.

REASONS FOR DENYING THE WRIT

One thing must be made perfectly clear from the outset — the Cities are wrong when they contend that the Court of Appeals held they were not entitled to attorney's fees for the preliminary injunction phase of this case because they did not receive an award of damages. What the Court of Appeals held is that the Cities' antitrust claims had no merit from the day the Complaint was filed. That is more than a question of semantics — both lower courts held essentially, that the preliminary injunction had been improvidently granted. Furthermore, the Cities' arguments in favor of granting the writ are factually flawed. In the first sentence of the argument they flatly state that "the Cities [ ] obtained permanent relief for the future through the Stipulation of July 22, 1988," completely ignoring the District Court's contrary finding of fact, which finding was undisturbed by the Court of Appeals. Without that basic factual assumption, the rest of the Cities' argument simply falls apart.

Ultimately, the Cities' attempt to cobble together cases from disparate, and sometimes mutually exclusive, theories of attorney's fee recovery is fruitless because those cases do not dictate a different result here. Indeed, under the teachings of the very cases the Cities cite, no other result was

possible, for those cases all hold that when a plaintiff receives nothing for its litigation effort, it is not entitled to an award of attorney's fees under any fee-shifting statute. As a result, the Cities have not demonstrated any need for this Court's review and their Petition should be denied.

I. THE COURT OF APPEALS' DECISION IS COMPLETELY IN ACCORDANCE WITH THE LAW AND DOES NOT CONFLICT WITH A PRIOR DECISION OF ANY COURT

The Cities initially rely on *City of Malden v. Union Elec. Co.*, 887 F.2d 157 (8th Cir. 1989), and *Southwest Marine, Inc. v. Campbell Indus.*, 796 F.2d 291 (9th Cir. 1986), for the proposition that a plaintiff can obtain an award of attorney's fees under Clayton Act § 16, 15 U.S.C. § 26, even though it does not obtain an award of damages under Clayton Act § 4, 15 U.S.C. § 15. The Cities claim that the Court of Appeals' decision in this case conflicts with that proposition, but that argument is merely a straw man. The Tenth Circuit did not hold that an award of damages under § 4 was a prerequisite to an award of attorney's fees under § 16, hence the conflict the Cities imagine is illusory. More importantly, the holding in those cases actually dictates the result the Tenth Circuit reached here.

The Cities imply that the plaintiff in the *City of Malden* case was awarded attorney's fees but it was not, and the reasons why it was not also preclude an award to the

Cities.[5] In *City of Malden* the plaintiff sought a preliminary injunction to require interconnection to the defendant's electrical transmission system to allow it to purchase power from third parties at favorable rates. While the case was pending, the parties concluded negotiations which had been ongoing long before the suit was filed which provided for a new contract to allow the access the plaintiff desired. When the case was tried on the merits, the jury returned a verdict for the defendant. There, as here, the municipal plaintiff claimed that the renegotiated contract was partial success in the litigation entitling it to attorney's fees under § 16.

The Court of Appeals held that the "plaintiff may be viewed as a 'prevailing party' if the plaintiff's lawsuit and plaintiff's attorney's efforts were 'a necessary and important factor' in achieving the [service] requested by plaintiff in its motion for preliminary relief." *City of Malden*, 887 F.2d at 165 (*quoting United Handicapped Fed'n v. Andre*, 622 F.2d 342, 346 (8th Cir. 1980). The District Court in that case had found that the new service was the result of the ongoing negotiations, not the litigation, and the Court of Appeals held that finding was not clearly erroneous. Therefore, the plaintiff was not entitled to an award of attorney's fees. That is precisely what happened here. The District Court found, as a matter of fact, that any benefit the Cities received was the result of the conclusion of the ongoing FERC proceedings and not this litigation, and the Tenth Circuit did not disagree with that finding. Hence, the Court of Appeals decision in

---

[5] The Cities' implication about the *City of Malden* case is quite disingenuous since the plaintiff there was represented by the same counsel who represents the Cities here.

this case is not in conflict with the decision in *City of Malden*, but rather closely parallels it.

Southwest Marine likewise is not inconsistent with the Court of Appeals' decision here. In *Southwest Marine*, the plaintiff sought access to a dry dock facility, and while the case was pending, the defendant agreed to give the plaintiff the access it sought. *Southwest Marine, Inc. v. Campbell Indus.*, 732 F.2d 744, 747 (9th Cir.), *cert. denied sub nom, Triple "A" Machine Shop, Inc. v. Southwest Marine, Inc.*, 469 U.S. 1072 (1984). On a later appeal, the Court of Appeals found the plaintiff's claims to be meritorious and remanded to the District Court. While on remand, however, the law in that circuit changed in such a way as to give the defendant a complete defense and the District Court granted summary judgment for the defendant and denied plaintiff's application for attorney's fees. *Southwest Marine, Inc. v. Campbell Indus.*, 796 F. Supp. 291 (S.D. Cal. 1985). The plaintiff did not appeal the summary judgment, but did appeal the denial of its attorney's fees application.

The Ninth Circuit held that, since the plaintiff's case had merit when it was filed and when the plaintiff obtained partial relief, some award of attorney's fees would be appropriate. But that is not the case here. The Cities' claims never had any merit. No new law resulted in their losing on the merits; that loss was the result of fuller examination of a more complete record.[6] *Chanute II*, 1990-1 Trade Cas.

---

[6] The Cities argued below that since "likelihood of success on the merits" was an element of their proof at the preliminary injunction stage, the grant of the preliminary injunction must have been a decision that (continued...)

(CCH) at p. 63,195. Furthermore, the District Court found as a matter of fact that this litigation was not the cause of the Cities receiving transportation. Therefore, the lower courts' decisions in this case are not at all inconsistent with the decisions in *Southwest Marine*.[7]

Next the Cities argue that the Court of Appeals' decision conflicts with this Court's holding in *Farrar v. Hobby*, 506 U.S. ___, 113 S.Ct. 566 (1992), that a plaintiff substantially prevails when it receives relief which "materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." Petition at 8. The problem with that argument, of course, is that it is dependent on a factual finding that the Cities received something from this litigation which "materially alters" their relationship with WNG. The

---

[6] (...continued)
their claims had merit. But as the District Court pointed out, that preliminary injunction decision was based on the "relaxed" standard employed in the Tenth Circuit under which a plaintiff that has proved it will be irreparably harmed need only demonstrate that its claim on the merits presents a fair ground for litigation. *Lundgrin v. Claytor*, 619 F.2d 61, 63 (10th Cir. 1980). Therefore, the preliminary injunction order was not a ruling on the merits of the Cities' claims.

[7] Furthermore, the *Southwest Marine* case is of dubious precedential value in the first place. The Ninth Circuit later amended its decision to make perfectly clear that it was based strictly on a finding of fact that the defendant had acquiesced in the plaintiff's demands as a result of the lawsuit. *Southwest Marine, Inc. v. Campbell Indus.*, 806 F.2d 898 (9th Cir. 1986). Then when the court denied rehearing and rehearing *en banc*, four judges dissented, calling the result reached "a substantial miscarriage of justice." *Southwest Marine, Inc. v. Campbell Indus.*, 811 F.2d 501, 503 (9th Cir.), *cert. denied sub nom, Triple A Mach. Shop, Inc. v. Southwest Marine, Inc.*, 484 U.S. 895 (1987).

District Court actually found just the opposite to be true; the transportation service the Cities receive is the result of the FERC regulatory approval process, not this litigation.

In fact, this Court's *Farrar* decision actually supports the Court of Appeals' decision in this case. In *Farrar* the Court required that a plaintiff "obtain an enforceable judgment against the defendant from whom fees are sought, or comparable relief through a consent decree or settlement," before it can be considered a prevailing party. 113 S.Ct. at 573. Merely obtaining a favorable ruling from a court is not enough: "a judicial pronouncement that the defendant has violated the Constitution, unaccompanied by an enforceable judgment on the merits, does not render the plaintiff a prevailing party." *Id.* That is all that can be said of the Cities' case here. They obtained an order which improvidently entered a preliminary injunction, and nothing more. The injunction was never implemented and the Court of Appeals stayed its effect until it was ultimately dismissed.

After that, the District Court and the Court of Appeals held that the Cities' lawsuit had no merit from the outset, and that the injunction never should have been entered. *Chanute VI*, 31 F.3d at 1049 n.13, App. at 16a-17a. Under *Farrar*, that is not enough to entitle the Cities to an award of attorney's fees, and the lower courts' decisions denying those fees is entirely consistent with *Farrar*. *See also Rhodes v. Stewart*, 488 U.S. 1 (1988) (prisoner plaintiffs who were either dead or released at time of judgment could not benefit from it and were not entitled to award of attorney's fees); *Hewitt v. Helms*, 482 U.S. 755, 760 (1987) ("Respect for ordinary language requires that a plaintiff receive at least

some relief on the merits of his claim before he can be said to prevail").

Finally, the Cities attempt to create some sort of internal conflict within the Tenth Circuit by complaining that the decision in this case conflicts with the earlier decision in *Dahlem v. Board of Education*, 901 F.2d 1508 (10th Cir. 1990). In *Dahlem* the plaintiff obtained a preliminary injunction requiring his high school to allow him to be a member of the school's previously all-girl gymnastics team, and the school honored the injunction while it appealed. While the appeal was still pending, however, the plaintiff was graduated from the school, thereby making the case moot. In a companion case which did not become moot, the Court of Appeals reversed the district court's injunction.

The Cities claim the holding in *Dahlem* means they should be considered prevailing parties without regard to whether their case had any merit because they obtained a preliminary injunction. But that is not the import of *Dahlem*; the point of that case was that the plaintiff received all the relief he asked for solely as a result of the preliminary injunction, and therefore, rightly or wrongly, he completely prevailed in the litigation. Here the Cities obtained no relief and could not be considered to have prevailed, either on the merits or otherwise. The Court of Appeals correctly noted that important difference and found *Dahlem* readily distinguishable from the present case. *Chanute VI*, 31 F.3d at 1048, App. at 13a.

Thus, the Cities' attempt to find conflicts between the Court of Appeals' decision in this case and various other

decisions is to no avail. Indeed, rather than conflicting with it, those other cases support the result the Court of Appeals reached. Therefore, the Cities have shown no basis for this Court's review and their Petition for a Writ of Certiorari should be denied.

II. THE CITIES DID NOT ESTABLISH THAT THEY ARE ENTITLED TO AN AWARD OF ATTORNEY'S FEES

In the court below, the Cities relied primarily on the line of cases beginning with *Nadeau v. Helgemoe*, 581 F.2d 275 (1st Cir. 1978), and later endorsed by this Court in *Texas State Teachers Ass'n v. Garland Indep. School Dist.*, 489 U.S. 782 (1989), and *Hensley v. Eckerhart*, 461 U.S. 424 (1983). Those cases provide a test for determining when plaintiffs substantially prevail in cases in which no final judgment is rendered because the defendant voluntarily acquiesces in the relief sought by the litigation. In the Tenth Circuit, the test requires the plaintiff seeking attorney's fees to prove two elements:

> (1) that [the] lawsuit is causally linked to securing the relief obtained, and (2) that the defendant's conduct in response to the lawsuit was required by law.

Foremaster v. City of St. George, 882 F.2d 1485, 1488 (10th Cir. 1989), *cert. denied*, 495 U.S. 910 (1990). *See also Luethje v. Peavine School Dist.*, 872 F.2d 352, 354 (10th Cir.

1989).[8] The first element requires that a plaintiff "obtain an enforceable judgment against the defendant from whom fees are sought, or comparable relief through a consent decree or settlement." *Farrar v. Hobby*, 506 U.S. ___, 113 S.Ct. 566, 573 (1992) (citations omitted).

Obviously the Cities did not receive an "enforceable judgment" against WNG; even the preliminary injunction was stayed (and hence not "enforceable"), and WNG ultimately received a full judgment against the Cities on the merits. Instead, the Cities have argued that the Stipulation between the parties which resulted in the dismissal of their preliminary injunction and WNG's appeal was a "settlement." The District Court found, as a matter of fact, that the Stipulation did not satisfy the first *Nadeau* element, and the Court of Appeals found, as a matter of law, that it did not satisfy the second element. Both are right.

---

[8] Lower courts have articulated a similar test under Clayton Act § 16, requiring the court to examine:

> a) the situation immediately prior to the commencement of suit, and b) the situation today, and [c] the role, if any, played by the litigation in effecting any changes between the two.

F. & M. Schaefer Corp. v. C. Schmidt & Sons, Inc., 476 F. Supp. 203, 206 (S.D.N.Y. 1979)(footnote deleted). *See also Harnischfeger Corp. v. PACCAR, Inc.*, 503 F. Supp. 102, 104-05 (E.D. Wis. 1980).

A. The District Court's Decision Was Based Entirely On A Finding Of Fact Subject To A Clearly Erroneous Standard Of Review

The Cities contend that they should have been awarded attorney's fees because, by virtue of the Stipulation entered into by the parties to dismiss the initial preliminary injunction appeal after it had become moot, they supposedly obtained "right[s] that went substantially beyond the limited transportation available to the Cities under WNG's filings at the FERC." Petition at 9. Therefore, they argue, they are like the plaintiff in *Farrar v. Hobby*, 506 U.S. ___, 113 S.Ct. 566 (1992), whom this Court held could be a prevailing party because he obtained an award of nominal damages.

The problem with that argument is that it wholly ignores the fact that the District Court, after hearing evidence from the parties including witnesses called by the Cities, found as a matter of fact that "[t]he Cities have failed to prove their litigation influenced the relationship between WNG and the Cities or affected WNG's behavior toward the Cities." *Chanute V*, 820 F. Supp. at 1293, Sup. App. at 30a.

This Court has often held that, absent "extraordinary reasons," it will not review findings of fact to determine whether they have support in the record. *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987); *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, 98 n.15 (1984); *United States v. Doe*, 465 U.S. 605, 615 (1984); *Rogers v. Lodge*, 458 U.S. 613, 623 (1982); *Branti v. Finkel*, 445 U.S. 507, 512 n.6 (1980); *Berenyi v. District Director, INS*, 385 U.S. 630, 635 (1967). Although the Court of

Appeals found it unnecessary[9] to address these fact findings because it affirmed based on other legal grounds, it did acknowledge the evidence in the record upon which that fact finding was based, and which preclude any conclusion that the District Court's findings of fact were clearly erroneous. Hence this Court should not waste its valuable time and resources by reviewing a case which revolves largely around issues of fact best resolved by district courts.[10]

B. The District Court's Finding That The Transportation Service The Cities Receive Is Not The Result Of This Litigation Is Not Clearly Erroneous

The District Court found as a fact that the transportation service which the Cities now receive is not the result of this litigation, but rather of the FERC administrative process which had been under way for more than a year when the Cities filed this lawsuit. The Cities had the opportunity to try to prove otherwise but they simply failed to do so, and the District Court's findings are more than substantially supported in the record. *See, e.g., Royal Crown Cola Co. v. Coca-Cola Co.*, 887 F.2d 1480 (11th Cir. 1989),

---

[9] The Cities' Petition Appendix erroneously reports the Court of Appeals' opinion as using the word "necessary," when in fact the Court of Appeals found the factual review "unnecessary." *See* note 2, *supra.*

[10] *Cf. Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38 (1989) ("a prevailing party may, of course, 'defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals' "); *Whitley v. Albers*, 475 U.S. 312, 326 (1986) (same); *United States v. New York Tel. Co.*, 434 U.S. 159, 166 n.8 (1977) (same).

cert. denied, 497 U.S. 1011 (1990)("Royal Crown must put forth some evidence establishing that its litigation actually played a substantial role in the appellant's decision to abandon the acquisitions").

The Cities claim that they "prevailed" by entering into the Stipulation because it allegedly provided for transportation service not available in WNG's open-access transportation program under the RS&A, but that simply was not established in the record. The Stipulation by its own terms makes clear that the Cities obtained nothing more than what they were already entitled to under FERC regulations and the tariffs which the FERC had just approved. Indeed, virtually every clause in the Stipulation spelling out some right of the Cities is modified by reference to WNG's tariff.

> 1. . . . to provide the Cities with firm and/or interruptible transportation service *in accordance with WNG's FERC tariff* . . . .
>
> * * *
>
> 5. The Cities shall be subject to only those charges . . . as are contained in the *rates and procedures in WNG's transportation tariffs on file with the FERC* . . . .
>
> 6. . . . WNG shall submit to the Cities or their agent appropriate transportation

> contract(s) *in accordance with WNG's FERC tariff. . . .*

App. at 23a (emphasis added). Thus, the Stipulation made the tariff, as approved by FERC, the mode of service to be provided.

WNG had always made clear to the Cities that it was principally concerned with phasing out sales service to its large distribution customers, and that once agreements were reached with those customers, the smaller municipal distributors like the Cities could have whatever service they wanted. Indeed, the District Court noted that WNG's witnesses testified at the preliminary injunction hearing that once the RS&A was approved, "WNG would provide the transportation service sought by the Cities." *Chanute V*, 820 F. Supp. at 1293, Sup. App. at 30a.

The Cities' argument that the RS&A did not expressly guarantee them immediate 100% open-access within its four corners misses the point for the RS&A also did not prohibit that service; that right was inherent in the FERC's open-access orders and regulations, and no express statement providing for it was necessary. In fact, WNG allowed other customers who were not plaintiffs in this antitrust case to terminate their sales contracts and obtain 100% transportation, and the FERC approved those terminations in the same order in which it approved abandonment of sales service to the Cities. *See Williams Natural Gas Co.*, 48 F.E.R.C. (CCH) ¶ 61,057 (1989).

The fact that other customers obtained the same "benefit" as the Cities demonstrates that the transportation the Cities received is a result of the FERC proceedings, not this litigation. Other customers who did not sue WNG received the same benefit as the Cities, leading to the conclusion that the litigation had nothing to do with the service offered them by WNG. At the very least, that is a reasonable finding for the District Court to reach, and one which is not clearly erroneous.

C. The Cities' Antitrust Claims Were Without Merit From The Outset

The Cities attempt to avoid the second element of the test for substantially prevailing, "that the defendant's conduct in response to the lawsuit was required by law," by reference to *Dahlem*'s holding that the plaintiff there was a prevailing party without regard to the merits of his case. As discussed earlier, *Dahlem* has no bearing on this case since the plaintiff there received all that he asked for without any court ever determining the merits of his case. That is not what happened here.

The District Court and the Court of Appeals have both determined that the Cities' claims had no merit from the time the lawsuit was filed. The Court of Appeals stated it flatly: "Our rejection of the substance of the cities' antitrust claims amounts to a statement that they lacked merit from the inception of the suit, regardless of any preliminary determination by the district court." *Chanute VI*, 31 F.3d at 1049, n.13, App. at 17a. The District Court, too, was direct in its expression about the merits of the Cities' claims: "I

can say, given events that transpired and for other reasons, had I been privy to that which did transpire, at the time I took up the application for injunctive relief, I would have denied it." Transcript of hearing on Cities' Application for attorney's fees, Respondent's App. at 1a.[11]

This is not a case like *Southwest Marine* where the plaintiff's claims had merit when they were filed, but only later became meritless because of an intervening change in the law. Nothing changed from the time the Cities' filed this lawsuit until judgment was entered in WNG's favor and affirmed. The claims had no merit then and they have no merit now. In short, as the defendant argued in *City of Malden*, the Cities receive transportation in spite of this lawsuit, not because of it. *See* 867 F.2d at 165. Therefore, the lower courts were right to deny the Cities' attorney's fees application, and the case does not warrant this Court's review.[12]

---

[11] WNG has included as an appendix to this Brief a transcript of the District Court's oral ruling at the conclusion of the hearing on the Cities' Application for Attorney's Fees.

[12] In the courts below the Cities argued that they could satisfy this second element of the *Nadeau* test simply by demonstrating that their lawsuit was not "frivolous" when filed, relying on certain language in the Tenth Circuit's decision in *Supre v. Ricketts*, 792 F.2d 958 (10th Cir. 1986). That court, however, has recently clarified its position in *Kansas Health Care Ass'n, Inc. v. Kansas Dep't of Social & Rehabilitation Services*, 31 F.3d 1052, 1055 (10th Cir. 1994), a decision by the same panel that decided this case, where the Court of Appeals held that its language in *Supre* was merely one example of a case which would not merit attorney's fees. Hence, if the Cities attempt to resurrect the argument in a Reply Brief, it now has no basis in the Tenth Circuit, if it ever did.

CONCLUSION

This case, even more so than *Southwest Marine*, is described by Judge Noonan's concurrence in that case in which he stated:

> Most people if told you could bring a lawsuit, lose it, and then ask your opponent to pay you at least $363,000 in attorney's fees would think they had heard a joke or an extravagant parody of the mysterious ways of that old ass, the law.

796 F.2d at 292. The Cities filed this lawsuit, lost it because their claims had no merit, and now want WNG to pay them more than $800,000 in attorney's fees. They are not entitled to those fees and this Court should not waste its valuable resources hearing this case. Therefore, WNG respectfully requests that the Cities' Petition for a Writ of Certiorari be denied.

RESPECTFULLY SUBMITTED,

FEBRUARY 3, 1995

DONALD W. BOSTWICK
TERESA JAMES
ADAMS, JONES, ROBINSON
& MALONE, Chartered
600 Market Centre
155 North Market
P.O. Box 1034
Wichita, Kansas 67201
(316) 265-8591

JOHN T. SCHMIDT *
C. KEVIN MORRISON
CONNER & WINTERS
2400 First National Tower
15 East Fifth Street
Tulsa, Oklahoma 74103
(918) 586-5711

Attorneys for Respondent

DAVID J. BATOW
WILLIAM J. SEARS
THE WILLIAMS COMPANIES, INC.
One Williams Center
P.O. Box 3288
Tulsa, Oklahoma 74101
(918) 588-4229

* Counsel of Record

APPENDIX

* * * *

The Court: Okay. Probably be well advised to say with that I will repair and reflect on this and prepare a full opinion and announce the decision, and I do intend to put in place a brief opinion. But, Mr. Wheatley, I will tell you now I'm going to deny the fee for having prevailed at the preliminary injunction stage, and in saying that, I certainly take no heart in denying good lawyers attorney fees.

Certainly is true that: you did prevail at that time in that I did indeed put in place an order that required Williams to open its lines to transport gas, and it's true that in due course you prevailed, in that Williams did, in fact, open its lines, but I'm satisfied that the problem here is that Williams' acts are simply not related to this Court's order. It had appealed this Court's order; it had been stayed. And, as an aside, I can say, given events that transpired and for other reasons, had I been privy to that which did transpire, at the time I took up the application for injunctive relief, I would have denied it. More importantly, I'm satisfied that what had occurred was the Revised Stipulation and Agreement which FERC had approved, thrust of which then did clear the way for Williams to become a non-discrimination open access transporter under a permanent FERC-approved program. The stipulation that was negotiated at Colorado at the time this matter had been set for hearing clearly provides that on July 20th, Williams accepted a blanket open access certificate under Section 7 of the Natural Gas Act to implement the FERC's approval of Williams' Revised Stipulation and Agreement and Williams will provide and the Cities wish to obtain from Williams firm and/or interruptible transportation service for a hundred percent of their natural gas requirements, et cetera. That

language spells out the reasons that you prevailed, and the reasons were that Williams has finally prevailed with FERC and that they now have the open access certificate which permits them to open those lines.

I'm sure it is, sir, if that was not the case, then the stipulation would simply say as you came forward before the Tenth Circuit that Williams now agrees that the terms and conditions of the Court's order will be implemented. That was not the case, for what was agreed was that the appeal would be dismissed and that the injunction order would be withdrawn. I'm not persuaded then in anyway that Williams acted upon the terms of this Court's order, but for the reasons I indicated, and as a consequence then that action was for the reasons that I indicated and not because you prevailed here.

So, I'm going to deny the fee application under the Act. As I indicated, I will put in place a brief order that will spell it out a little better than what I have said, but will adopt what is made a part of this hearing.

Very well. We'll be in recess.

--**-*-*-*-*-*-*

(End of Proceedings.)